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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 199

FREDERICK D. DISMUKE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 1, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

No. 474 At Law

FREDERICK D. DISMUKE, Plaintiff-Appellee,

versus

THE UNITED STATES, Defendant-Appellant

[fol. 4] PETITION—Filed April 17, 1934

The petition of Frederick D. Dismuke respectfully shows:

1

The defendant herein is the United States of America, a corporation sovereign.

2

This suit is founded upon the laws of Congress which provide for the retirement of Civil Service employees, enacted on May 22nd, 1920, and found in the United States Code, Title 5, Section 691, et seq., and upon the various amendments to said legislation, as well as upon a contract between petitioner and the Government of the United States, as will be more fully hereinafter shown.

3

Petitioner became an employee of the United States on December 16, 1895, as a deputy United States Marshal and served the United States in such capacity until April 30th, 1902.

4

Petitioner became an employee of the United States on February 7th, 1902, as Postmaster at Thomasville, Georgia, and served the United States in such capacity until May 24th, 1914.

5

Petitioner became an employee of the United States on September 10, 1921, as prohibition officer and served the United States in such capacity until June 30th, 1930.

[fol. 5] 6

On July 1st, 1930, petitioner, still remaining as an employee of the United States, was transferred from the Treasury Department to the Department of Justice and continued to serve the United States as such employee until June 30th, 1933.

7

Between the dates of June 16th, 1933, and July 1st, 1935, to-wit: On June 30th, 1933, petitioner, being then and there an employee of the United States to whom Section 8-A of the Act of Congress approved June 16th, 1933 (Title 5 U. S. C. A., Section 692-D), applies and who had an aggregate period of service of more than thirty (30) years, computed as prescribed in Section 695-A of Title 5 U. S. C. A., was involuntarily separated from the services of the United States for reasons other than his misconduct. The reason for said separation from the services being "due to reduction in force."

8

On June 27th, 1933, petitioner directed a letter to the Director of Insurance, Veterans Administration, asking to be advised the amount of money to be refunded by him under the Retirement Act so as to place petitioner in line for the benefits under said Act and the Veterans Administration required petitioner to deposit the sum of $970.09, which was deposited by petitioner with the Treasurer of the United States on October 26, 1933, to the credit of the Civil Service Retirement and Disability Fund. This sum was the amount which petitioner was required to pay in order to entitle him to the annuity benefits provided by Section 8-A of the Act of Congress approved June 16, 1933, the statutory deductions called for by Section 8 of the Act of May 22nd, 1920, and amendments thereto having already [fol. 6] been deducted from petitioner's salary payments from March 1st, 1928 through June 30th, 1933.

9

From March 1st, 1928, to June 30th, 1928, petitioner, as an employee of the United States, earned a salary of $1,300.00, from which there was deducted by the United States for the Civil Service Retirement Fund 3½% or $45.50.

10

From July 1st, 1928, to December 31, 1928, petitioner, as an employee of the United States, earned a salary of $1,850.00, from which the United States deducted for the Civil Service Retirement Fund 3½% or $64.75.

11

From January 1st, 1929 to June 30th, 1933, petitioner, as an employee of the United States earned a salary of $13,300.00 from which the United States deducted for the Civil Service Retirement Fund 3½% or $466.50.

12

Petitioner has, therefore, in performance of his part of his contract with the United States, paid to the United States the proper amount of the premium for the annuity which the law provides for him, the total amount of $1,545.84, which is the entire amount which the United States has called upon him to pay.

13

When petitioner was in the employ of the United States as a deputy marshal as above alleged, he devoted his entire [fol. 7] time to the duties of that employment, it being a full time employment which required all of petitioner's attention.

14

Shortly after June 30th, 1933, petitioner filed his claim with the Administrator of Veterans Affairs for the annuity under the provision of Section 8-A of the Act of June 16th, 1933, and on or about December 26th, 1933, petitioner received a letter from H. L. McCoy, Director of Insurance, advising that this claim was rejected on the ground that petitioner did not render thirty (30) years of allowable service "the service as a field deputy United

States Marshal from December 16th, 1895, to April 30th, 1902, having been excluded upon the ground that field deputy marshals are regarded as employees of the Marshal and not of the United States." That was the only reason assigned by the Director of Insurance for disallowing petitioner's claim.

15

Shortly after receipt of said letter from the Director of Insurance, petitioner appealed from the decision of said Director to the Administrator of Veterans Affairs and on March 13th, 1934, the Board of Veterans Appeals rendered a decision, denying petitioner's claim for the same reason assigned by said Director of Insurance.

16

Petitioner has exhausted all opportunities available to him for a favorable decision before the Veterans Administration and petitioner alleges that the decision of the Director of Insurance and of the Board of Veterans appeals is arbitrary and capricious and is clearly erroneous for the [fol. 8] only question presented for their determination was a question of law and their decision is contrary to law.

Wherefore, Petitioner prays that process issue, directed to the Defendant, requiring it to be and appear at the next term of this Court to answer Petitioner's complaint and that petitioner have judgment against the Defendant for the amounts due petitioner under Section 8-A of the Act approved June 16th, 1933.

Carlisle & Bootle, Attorneys for Petitioner.

AFFIDAVIT OF SERVICE

Personally appeared before the undersigned attesting officer, W. A. Bottle, who being duly sworn says that he has caused a copy of the within petition to be served upon the District Attorney of the United States for the Middle District of Georgia, and that he has mailed a copy of said petition, with a copy of this affidavit, by registered mail to the Attorney General of the United States.

W. A. Botle.

Sworn to and subscribed before me, this 17th day of April, 1934.

Geo. F. White, Clerk, United States District Court.

ACKNOWLEDGEMENT OF SERVICE

Service of the within petition acknowledged, copy re-
[fol. 9] ceived, further service upon the United States Attorney waived.

This April 18, 1934.

A. Edward Smith, Asst. U. S. Atty.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO PETITION—Filed Oct. 26, 1934

Comes now the plaintiff and amends his petition by adding thereto the following paragraphs, to-wit:

17

Petitioner has elected to receive an increased annuity under the forfeiture proviso of Section 4 of the Amendatory Law and is entitled under Section 8 (a) of the Act of June 16, 1933, to receive an annuity in the amount of $1,181.16 per annum ($98.43 per month) from July 1, 1933, and in the amount of $1,224.00 per annum ($102.00 per month) from January 21, 1945, until the date of petitioner's death.

18

Should the Court decide that the time petitioner served as a field deputy marshal cannot be allowed in determining his eligibility to annuity petitioner is nevertheless entitled under Section 7 of the Act of May 29, 1930, to receive an annuity in the amount of $555.60 per annum ($46.30 per month) from July 1, 1933, until the date of petitioner's death.

[fol. 10] 19

Petitioner amends the prayer of the original petition by adding thereto the following, to-wit:

Petitioner prays specifically:

1. For judgment for all of the monthly installments which have accrued to date of judgment; and

2. That this Court, enter a declaratory judgment, declaring petitioner's rights in the premises; namely, that petitioner is entitled, under his annuity contract with the Government of the United States to receive future installments from the United States in the amounts and for the periods, or duration, of time set forth in paragraphs 17 and 18 of this amended petition.

Wherefore, Petitioner prays that this amendment be allowed and ordered filed.

Carlisle & Bootle, Attorneys for Petitioner.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING AMENDMENT

The foregoing amendment allowed and ordered filed this October 22, 1934.

Bascom S. Deaver, United States Judge.

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 7, 1934

Comes now the defendant in the above stated case and, subject to its general demurrer heretofore filed therein, and without admitting the jurisdiction of the Court, interposes its plea and answer therein and says:

1

The first paragraph is admitted.

2

The second paragraph is admitted.

3

This third paragraph is denied.

4

For the want of sufficient information, the facts alleged in the fourth paragraph can neither be admitted nor denied, but the defendant demands strict proof thereof.

5

For the same reasons as alleged in paragraph four, the allegations in the fifth paragraph can neither be admitted nor denied, but proof thereof is required.

6

And for the same reasons as above stated, the allegations of the sixth paragraph can neither be admitted nor denied, but strict proof is required.

[fol. 12] 7

The allegations relative to the length of service by petitioner as an employee of the United States as set out in paragraph seven are denied; the other averments therein contained are neither admitted nor denied, but proof thereof is required.

8

For the want of sufficient information, the allegations contained in the eighth paragraph of the petition are neither admitted nor denied, but strict proof thereof is required.

9

For the want of sufficient information, this defendant can neither admit nor deny the allegations contained in paragraphs nine, ten, eleven and twelve, but strict proof of all the allegations therein contained is required.

10

The thirteenth paragraph of the petition is denied, and this defendant says that the said petitioner has never been in the employ of the United States as a Deputy Marshal.

11

For the want of sufficient information, the allegations contained in paragraphs fourteen, fifteen and sixteen can neither be admitted nor denied, but the defendant requires strict proof of all of the material allegations therein contained.

[fol. 13] Wherefore, having fully answered, the defendant prays that it be discharged.

(Signed) T. Hoyt Davis, United States Attorney.
(Signed) H. G. Rawls, Asst. United States Attorney, Attorneys for Defendant.

Duly sworn to by H. G. Rawls. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

DEMURRER—Filed June 7, 1934

Comes now the defendant, the United States, and before [fol. 14] pleading to the merits of this said cause, interposes the following demurrers thereto:

1

Defendant demurs to the petition generally for the reason that the same fails to set forth any cause of action either legal or equitable against the defendant.

2

Because the petition shows upon its face that the District Court of the United States for the Middle District of Georgia, Macon Division, has no jurisdiction to entertain said cause for the reason that said suit is a suit against the Sovereign, and it is not alleged in the petition or otherwise stated that consent to be sued had previously been granted by the said Sovereign.

3

Defendant demurs generally to the said petition for the reason that it affirmatively appears therefrom that the plaintiff's claim, if any he has, is res judicata for the reason that it appears that the same has already been passed upon and denied by the proper authority vested with the power of determining such claims.

Wherefore, defendant prays that these its grounds of demurrer be inquired into by the Court, and that the petition be dismissed.

(Signed) T. Hoyt Davis, United States Attorney.
(Signed) H. G. Rawls, Asst. United States Attorney, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRER—Filed Aug. 31, 1934

After hearing arguments upon the defendant's demurrer to the petition in the above stated case it is hereby ordered that said demurrer be and the same is hereby overruled.

An exception to this order was noted by the defendant and allowed by the Court.

In open Court this 31st day of August, 1934.

Bascom S. Deaver, United States Judge.

Carlisle & Bootle, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

Findings of Facts, Conclusions of Law and Judgment

The above case having come on regularly for hearing the court makes therein the following findings of facts and conclusions of law:

FINDINGS OF FACTS

1. This case is based upon a claim against the United States not exceeding $10,000.00, founded upon the laws of Congress which provide for the retirement of civil service employees enacted on May 22, 1920, and upon the various amendments to said legislation as well as upon a contract between petitioner and the Government of the United States.

[fol. 16] 2. The Court hereby finds the facts to be as stipulated in the agreed statement of facts, upon which the case was tried, and adopts said agreed statement as its findings of fact as far as said agreed statement goes, other evidence having been introduced.

3. The Court hereby finds that throughout the petitioner's service as a field deputy marshal he devoted all of his time to the duties of his said office, having no other occupation and no other income.

4. The duties which petitioner as a deputy marshal performed were in general the same as the duties performed by marshals and deputy marshals today and were pre-

scribed by Acts of Congress and these duties were the same before and after field deputy marshals were placed upon a salary basis.

5. Throughout petitioner's service as a deputy marshal, he along with other deputy marshals, was paid for his services out of funds advanced to the United States Marshal by the United States.

6. Throughout petitioner's period of service as a deputy marshal the amount of his remuneration was prescribed by Acts of Congress, the Attorney General having the right to increase or decrease such remuneration subject to the limitation that such remuneration could not exceed three-fourths of the fees and emoluments received or payable for the services rendered by him. The amount of fees to be charged by deputy marshals for any particular service was prescribed by statute, but the remuneration received by such deputy was not affected one way or the other by the collection or non-collection of such fees or emoluments.

7. During the petitioner's services as a deputy marshal, a United States Marshal could not receive credit for any payment made to a deputy who had not been regularly ap- [fol. 17] pointed and who had not taken the oath of office prescribed by Section 782 of the Revised Statutes.

8. Throughout the period of petitioner's service as a deputy marshal the United States Attorney General issued instructions to the United States Marshals as he does today concerning the manner in which they and their deputies were to discharge their duties.

Conclusions of Law

1

This Court has jurisdiction of this controversy.

2

During petitioner's service as a deputy marshal from December 16, 1895, to April 30, 1902, he was performing services for and was working for the Government of the United States.

3

The purpose and intention of Congress in enacting the statutes relating to the retirement of civil service employees was to provide an annuity for those who had been regularly engaged in working for the Government for the prescribed periods.

4

Petitioner, as a field deputy marshal, was an employee of the United States within the meaning of Section 8 (a) of the Act of June 16, 1933, and the time which he served as a field deputy marshal can be used in determining his eligibility to annuity.

5

Petitioner is entitled to recover from the United States [fol. 18] $98.43 per month from July 1, 1933, to January 21, 1945, and is entitled to receive from the United States $102.00 per month from January 21, 1945, until the date of his death.

JUDGMENT

Whereupon, it is considered, ordered and adjudged that plaintiff, Frederick D. Dismuke, do have and recover of the United States the sum of $1476.45, representing fifteen monthly installments accruing from July 1, 1933, through the month of September 1934.

Petitioner, by his pleadings, having alleged an actual controversy and having asked for a declaratory judgment as well as a coercive judgment by virtue of the Act approved June 14, 1934, authorizing declaratory judgments, the rights of Frederick D. Dismuke, the petitioner, are hereby declared to be as follows:

Petitioner is entitled under his annuity contract to receive from the United States monthly installments of $98.43 from October 1, 1934 until January 21, 1945, and monthly installments of $102.00 from January 21, 1945, until the date of his death.

The coercive judgment in this case takes care of installments through the month of September, 1934, and the next installment due will be for the month of October, 1934, and will be payable on November 1, 1934.

This 25 day of October, 1934.

Bascom S. Deaver, United States Judge.

Exception

Exception noted and allowed. Oct. 25, 1934.
Bascom S. Deaver, Judge.

[fol. 19] In United States District Court

Petition for Appeal—Filed Jan. 17, 1935

Comes now the United States of America, the defendant in the above named and stated case, and feeling aggrieved by the order of the said Court dated August 31, 1934, overruling the defendant's demurrer to the petition in said case, and the judgment in favor of the plaintiff dated October 25, 1934, does hereby appeal said orders and judgments to the Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the recorded proceedings and documents upon which said proceedings were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of such Court in such cases made and provided.

T. Hoyt Davis, United States Attorney. H. G. Rawls, Assistant United States Attorney, Attorneys for Appellant.

[File endorsement omitted.]

In United States District Court

Order Allowing Appeal

The foregoing appeal is hereby granted and allowed, to be effective upon the filing thereof, and said appeal shall serve as a supersedeas.

This 17 day of January, 1935.

Bascom S. Deaver, United States District Judge.

[fol. 20] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Jan. 17, 1935

The United States of America, appellant herein, in connection with its petition for appeal, makes the following assignment of errors, which it appears were committed by the Court in said case:

1. The Court erred in overruling the demurrer of the defendant to the plaintiff's petition.

2. The Court erred in overruling the motion of the defendant for a judgment in its favor at the conclusion of the introduction of the evidence in said case.

Wherefore, appellant prays that the judgment of the said District Court of the United States for the Middle District of Georgia be reversed.

T. Hoyt Davis, United States Attorney, H. G. Rawls, Assistant United States Attorney, Attorneys for Appellant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ACKNOWLEDGMENT OF SERVICE—Filed Jan. 17, 1935

Due and legal service of the foregoing petition for appeal, the order of the Court thereon, and the assignment of [fol. 21] errors is acknowledged. Copy received, and all other and further service is waived.

This 17 day of January, 1935.

Carlisle & Bootle, Attorneys for Appellee.

Post Office Address: Macon, Georgia.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Jan. 17, 1935

Be it remembered that on the 25th day of October, 1934, there came on to be tried before the Honorable Bascom S.

Deaver, Judge of the District Court of the United States for the Middle District of Georgia, without the intervention of a jury, the above stated cause.

STIPULATION AND AGREED STATEMENT OF FACTS

The following stipulation was entered into:

"It is hereby stipulated and agreed that the above stated case shall be tried upon the following agreed statement of facts, with the privilege to either party to introduce any additional evidence which is competent and relevant to the issue and which is not inconsistent with or contradictory of this agreed statement of facts:

"On December 16, 1895, Frederick D. Dismuke, hereinafter called petitioner, was duly and regularly appointed as a deputy United States marshal for the Northern District of Georgia and on the same date took and subscribed to the United States Deputy Marshal's oath of office, which oath of office was as follows:

[fol. 22] "UNITED STATES OF AMERICA,
Northern District of Georgia, ss:

"I, F. D. Dismuke, Jr., of Griffin, County of Spalding, and State of Georgia, having been appointed on the 16th day of December, 1895, to the Office of United States Deputy Marshal do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. And I do further solemnly swear that I will faithfully execute all lawful precepts directed to the Marshal of the Northern District of Georgia, under authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of Marshal's Deputy of the Northern District of Georgia, during my continuance in the said office, and take only my lawful fees. So help me God.

"F. D. Dismuke, Jr.

"Sworn and subscribed to this 16th day of December in the year 1895 before me.

"Wm. T. Newman, U. S. Judge."

"Petitioner entered upon his duties as deputy marshal on the date above mentioned and served continuously as such deputy marshal on a fee basis until April 30, 1902. Petitioner was a field deputy as distinguished from an office deputy.

"On February 7, 1902, petitioner was duly and regularly appointed as postmaster at Thomasville, Georgia, and continued to hold said office and discharge its duties until April 27, 1914.

[fol. 23] "On September 10, 1921, petitioner was appointed Federal Prohibition Director and continued as an employee of the United States in the Prohibition Service until June 30, 1933.

"On June 30, 1933, petitioner being then an employee of the United States to whom the Civil Service Retirement Act, approved May 29, 1930, applied was involuntarily separated from the service for reasons other than his misconduct, the reasons for said separation from the service being "due to reduction in force."

"On June 27, 1933, petitioner addressed and mailed to the Director of Insurance, Veterans Administration, Washington, D. C. a letter, as follows:

Macon, Georgia, June 27th, 1933.

"Director of Insurance,
Veterans Administration,
Washington, D. C.

"Dear Sir:

"I have been a Government employee for over thirty-one years and a Civil Service employee since March 1st, 1928. I was not in Government service in August, 1920, but did return to the Government service on September 10th, 1921, at a salary of $4,000 per year until September, 1925, when this salary was reduced to $3,900, until March 1st 1928. I am now fifty eight years of age.

"Please advise me the amount of money to be refunded by me under the Retirement Act which will place me in line for the benefits under this Act, and also the amount of compensation I will draw.

"I respectfully request that I be furnished with the latest [fol. 24] order under the Retirement Act for employees who through no fault of theirs are separated from the service; for example, repeal of the Eighteenth Amendment, which will abolish the position I now occupy. Also please furnish information about the President's order concerning retirement of Government employees after thirty years of service.

"Respectfully, F. D. Dismuke, Deputy Prohibition Administrator."

In reply to the foregoing letter petitioner was advised he should deposit with the Treasurer of the United States the sum of $970.09. On October 26, 1933, petitioner forwarded the said sum of $970.09 to the Treasurer of the United States and thereafter received a certificate of deposit as follows:

"(This Deposit Is Not Subject To Check) Cash Room.

"Thomasville, Georgia, Deposit No. 5998.
(Address of depositor and date sent)
(To be filled in by Depositor)

"Frederick D. Dismuke
(Name of depositor)

_____
(Title)

"has deposited with Treasurer U. S. , _____
(Name of depositary) (Place)

"Nine Hundred seventy 09/100 Dollars
"on account of 100
service credit payment to civil service $970.09
retirement and disability fund Claim D 18566.

/926/33

[fol. 25] "This certificate of deposit issued subject to deduction for uncollectible items.

I certify that the above amount has been received and credited in the account of the Treasurer of the U. S.

Depositary will date, sign and return this to Depositor for his retained copy.

Nov. 4 1933
(Date credited)
Signed (illegible)

Acting Assistant Treasurer.
Cashier
2—15050"

Neither the whole of this deposit nor any part thereof has been returned to petitioner.

"Petitioner had come under the provisions of the Civil Service Act on February 29, 1928, and all of the deductions from his pay called for by said Act were duly and regularly made thereafter.

"Petitioner has paid to the Government all of the deductions, refunds and amounts required of him under the Civil Service Act or the Annuity Act in order to make him eligible for the annuity benefits, petitioner having paid approximately $1650.00 to the Government in order to be eligible for such annuity benefits.

"Shortly after June 30, 1933, petitioner filed his claim with the Administrator of the Veterans Affairs for the annuity under the provisions of section 8 (a) of the Act of June 16, 1933, and on or about December 26, 1933, petitioner received a letter from H. L. McCoy, Director of Insurance, as follows:

[fol. 26] "Retirement Subdivision-FBC
R-53416, Frederick D. Dismuke.

"Mr. Frederick D. Dismuke,
Thomasville, Georgia.

"DEAR SIR:

"Referring to your above entitled claim for annuity under the provisions of Section 8 (a), Act of June 16, 1933, you are advised that it is rejected on the ground that you did not render 30 years of allowable service as required by said Act, the service as a Field Deputy U. S. Marshal from December 16, 1895, to April 30, 1902, having been excluded

upon the ground that Field Deputy Marshals are regarded as employees of the Marshal and not of the United States.

"In accordance with existing rules of practice you are allowed one year from the date of this letter within which to enter an appeal from the adverse action taken to the administrator of Veterans Affairs, Veterans Administration, Washington, D. C. Your appeal should be mailed in an envelope addressed to the Director of Insurance, Veterans Administration, Washington, D. C. A copy of the rules of practice in the matter of appeal is enclosed for your information.

"However, instead of making an appeal as above indicated, you are at liberty to furnish material evidence, for the purpose of obtaining further consideration of your claim by the Director of Insurance. Should he deem the additional evidence sufficient to warrant reopening such action will be taken, but if not considered thus sufficient you will be advised accordingly and of your right to appeal in the manner hereinbefore set forth.

"Respectfully, H. L. McCoy, Director of Insurance."

dbp/meh
Enc.

[fol. 27] Shortly after receipt of said letter from the Director of Insurance, and within the time allowed by law and the regulations, petitioner appealed from the decision of said Director to the Administrator of Veterans Affairs and on March 13, 1934, the Board of Veterans Appeals rendered a decision as follows:

"Dismuke, Frederick D. M-123
"R-53,416 Civil Service Retirement Act, May 29, 1930.
Affirmed.

"Appeal has been entered under the authority of Veterans Regulation No. 2 (a), Part 11, from the decision of the Director of Insurance, holding that for civil service retirement purposes this former civil service employee is not entitled to be credited with certain time that he served as field deputy marshal on a fee basis.

The question at issue:

"May the time that this appellant served as a field deputy marshal be used in determining his eligibility to annuity?

"The appellant became separated from the service on June 30, 1933. He filed application for annuity under the provisions of Section 8 (a) of the Independent Offices Appropriation Act, approved June 16, 1933, which provides in substance that Civil Service employees who are involuntarily separated after having had thirty years of accredited service shall be entitled to retirement, the same as though they had reached the retirement age, with the exception that three and one-half per centum shall be deducted from the annuity until the retirement age is reached.

"The appellant's claim was rejected for the reason that he did not have thirty years of service exclusive of employment which he rendered as a field deputy marshal from [fol. 28] December 16, 1895, to February 6, 1902. A more specific ground of rejection was that field deputy marshals are employees of the marshal and not employees of the United States for civil service retirement purposes.

"The claimant has filed a brief, in which he cites reasons and authorities to support his claim that field deputy marshals are employees of the United States.

"The question at issue in this claim is not a new one. In the claim of George Taylor Larkin, decided by the Secretary of the Interior, October 4, 1920, recorded in 21 P. & R. D., 42, it was held that "deputy marshals were employed by the marshal and not by the United States." As authority for this decision the Secretary of the Interior cited Powell v. United States, 60 Fed. Rep., 687, Douglass v. Wallace, 161 U. S., 346, and 3 Comptroller's Dec., 648.

"It has been the consistent practice in the adjudication of retirement claims not to allow credit for service rendered as field deputy marshal on a fee basis. There is a distinction between field deputy marshals and office deputies. The position of office deputy marshal was brought into the classified civil service on May 6, 1896. Also, by executive order on March 2, 1909, deputy marshals, other than those employed as field deputies whose chief duties were to serve process, were brought into the classified service. They remained in the classified service until the Act of October 22, 1913, which act made it optional with the marshal whether deputies should be appointed with regard to the Civil Service Act. However, field dep-ty marshals always have been considered employees of the marshal. They hold office at his pleasure and are paid by fees. As stated

in Powell v. United States, cited supra, the deputy "may have any contract with the marshal for his compensation which they may see fit to make," with the limitation that the deputies shall not receive more than three-fourths of the fees. In that decision it was held specifically that "a [fol. 29] deputy marshal is not an officer of the United States and cannot maintain a suit against it for services rendered."

"Section 8 (a) of the Independent Offices Appropriation Act, June 16, 1933, provides that the thirty years of service required by such section shall be computed as prescribed in Section 5 of the Civil Service Retirement Act of May 29, 1930. It is provided in Section 5 of the Act of May 29, 1930, that the aggregate period of service shall be computed from 'date of original employment, whether as a classified or unclassified employee in the civil service of the United States.' In construing the word 'employee' as used in Section 5, it has been held that it usually means a person employed in regular and continual service for wages or a salary as contradistinguished from one engaged for particular transactions. (22 P. & R. D. 31, citing Louisville, Evansville and St. Louis Railroad Company v. Wilson, 138 U. S., 501.) The service rendered by a field deputy marshal as a process server on a fee basis is not necessarily continual. His service is more in the nature of a contract to perform specific duties on a fee basis when and if necessary. The amount of time involved is not an important factor.

"For the reasons stated, and in conformity with precedents, it is the decision of the Board of Veterans' Appeals that the service rendered by this appellant as a field deputy marshal over the period of time in question may not be used as accredited service in the computation of his right to benefits under the Civil Service Retirement Act of May 29, 1930, and Sec. 8 (a) of the Independent Offices Appropriation Act of June 16, 1933. The decision appealed from is affirmed.

"Approved March 1, 1934,
"Board of Veterans' Appeals."

"The only question at issue in this case is whether the time petitioner served as a field deputy marshal can be used in determining his eligibility to annuity, or to state

[fol. 30] it differently, was petitioner as a field deputy marshal an employee of the United States for civil service retirement purposes.

"Assuming that credit is granted for the service in question, the petitioner is entitled to an annuity under section 8 (a) of the Act of June 16, 1933, in the amount of $1181.16 per annum from July 1, 1933, and $1224.00 per annum from January 21, 1945. And if credit is not granted for the service in question petitioner is entitled under the terms of section 7 of the Act of May 29, 1930, to an annuity at the rate of $555.60 per annum from July 1, 1933.

"Ever since the passage of the Act of May 28, 1896, field deputy marshals have been and are paid by the check of the marshal drawn on the Treasurer of the United States.

"The employment record and the retirement record of petitioner is correctly stated on the record attached hereto and marked "Exhibit A"."

EXHIBIT "A"

[fol. 31]
No. 4457

Dismuke (Surname) Frederick (First Name) D. (Second Name)

Date of Birth: Month 1, Day 21, Year 1875
Legal Voting Residence: State and Cong. District Georgia, County Thomas, City or Town Thomasville
Sex M Race W
Military Service: Yes .... No x
Retirement Age 70
Military Pension on war risk: Compensation Yes ... No

Reference Nature of Action	Position and Grade		Salary Pay Less Basic Allowances Pay	Effective Date	Department or Establishment Official Station	Total Service Mos. Days Yrs.
Appointed	Fee Deputy		Fees	12/16/95	Justice, U. S. Mars. Of., Griffin, Ga.	
Transferred	" "		Fees	10/10/97	Justice, U. S. Nars. Of., Columbus, Ga.	
Resigned	" "		Fees	4/30/02	Justice, U. S. Mars. Of., Columbus, Ga.	
Appointed	Postmaster		$2200	2/ 7/02	P. O. Dept., Thomasville, Ga.	
Promoted	"		2300	7/ 1/02	" " " " "	
Promoted	"		2400	7/ 1/03	" " " " "	
Promoted	"		2500	7/ 1/06	" " " " "	
Promoted	"		2600	7/ 1/10	" " " " "	
Expired	"		2600	4/27/14	" " " " "	
Appointed	Fed. Pro. Dir.		4000	9/10/21	Treas., I. R., Atlanta, Ga.	
Classified	" " "	(CAF-11)	4000	7/ 1/24	" " "	
Transferred	Dep. "	Admr. (CAF-10)	3900	9/ 1/25	" " Savannah, Ga.	
Transferred	" " "	"	3900	4/ 1/27	" Pro., Savannah, Ga.	
Transferred	" " "	"	3900	2/ 1/28	" " Macon, Ga.	
Appt. Prob. CS	" " "	"	3900	3/ 1/28	" " " "	
Welch Act	" " "	(CAF-9)	3700	7/ 1/28	" " " "	
Promoted	" " "	(Class. Pend)	3800	7/ 1/29	" " " "	
Transferred	" " "	"	3800	7/ 1/30	Justice " " "	
Temp. Desig.	Actg. Dep. "	" "	3800	7/ 1/30	" " " "	
Perm. Desig.	Dep. Pro. "	(CAF-9)	3800	10/16/31	" " " "	
Dropped-R	" " "	"	3800	6/30/33	" " " "	

Sec. 8a Act of 6/16/33
Education: (Indicate Number of years)
Common School 1 2 3 4 5 6 7 8
High School 1 2 3 4
College 1 2 3 4
Junior College.....
Degrees, If Any .....

Special Qualifications

* Dual Service, no attempt to verify.

5-10659

[fol. 32]

No. .....

Dismuke	Frederick	D.
(Surname)	(First Name)	(Second Name)

Date of Birth: Month 1, Day 21, Year 1875
Sex M Race W
Retirement Age 70

Date | Designation | Office

Date	Fiscal Year Deductions and Service Credit Contributions	Tontine Deductions	Net Fiscal Year Deductions and Service Credit Contributions	Departments Establishments Will Not Use This Column	Balance Forward	Total Credited to Employee	Date of Original Appointment 12/16/95 Remarks
1928	$45.52						Ded began 3/1/28
1929	131.22						
1930	132.96					$309.70	
1931	132.96	$12.00	$120.96		$309.70	$430.66	
1932	132.96	$12.00	$120.96		$430.66	$551.62	
6/30/33		$12.00	$121.20		$551.62	$672.82	

Aug. 11, 1933 Deducations and service history certified correct D. H. Reichgut Chief

Records verified. Claimant appears entitled
CJB to annuity. Civil Service Commission: By Wm. C. Andrew, Chief, Retirement Section Aug. 16, 1933.

Retirement Record Card—Civil Service Commission Form 2806—Feb. 1931

[fol. 33] Retirement Subdivision 2806

File
Noted

Received by
Jan. 18, 1933

Veterans Administration

E. R. M.
1-22-34

Service Record and
Washington Retirement Division

January 17, 1934

Chief Clerk,
Department of Justice,
Washington, D. C.

SIR:

For the information of your office and for the purpose of completing your record, you are advised that claim No. R 53416, under section 8 (a) of the act of June 16, 1933, of Frederick D. Dismuke, Thomasville, Georgia, a former employee of the Bureau of Prohibition, (Deputy Prohibition Administrator) has been rejected on the ground that claimant did not render thirty years' allowable service as required by said Act, the service as a Field Deputy, U. S. Marshal fr. from December 16, 1895, to April 30, 1902, having been excluded upon the ground that Field Deputy Marshals are regarded as employees of the Marshal and not of the United States.

Respectfully, H. L. McCoy, Director of Insurance.

3-2116.

The following evidence was introduced on behalf of the plaintiff:

The following excerpts from Instructions to United [fol. 34] States Marshals, Attorneys, Clerks and Commissioners, dated July 1, 1895:

"Department of Justice, Washington, D. C., July 1, 1895.

To United States Marshals, Attorneys, Clerks and Commissioners:

The following instructions are issued for your guidance in performing the duties of your office and rendering your accounts to the Government.

A careful observance of these requirements will obviate the necessity for much of the correspondence which is now found necessary relative to your duties and the rendition of your accounts.

Respectfully, Judson Harmon, Attorney-General."

Page 6:

"Marshals are the disbursing officers of the courts. Congress annually appropriates money for the maintenance of the United States Courts under the following heads, viz: Fees of jurors, fees of witnesses; support of prisoners; pay of bailiffs, etc., and miscellaneous expenses. Advances are made to marshals upon their requisitions sent to the Attorney-General, under each of the appropriations. Funds so advanced must be kept separate and not used except to defray expenses incurred under the appropriation from which advanced. Limited advances are also made on account of fees and expenses of Marshals."

Page 8:

"In accordance with the provisions of the above sections, any public money advanced to disbursing officers of the [fol. 35] United States must be deposited immediately to their respective credits, with either the United States Treasurer, some assistant treasurer, or designated depositary, other than a national bank depositary, nearest or most convenient, or, by special direction of the Secretary of the Treasury, with a national bank depositary, except ——".

"Any check drawn by a disbursing officer upon moneys thus deposited must be in favor of the party, by name, to whom the payment is to be made, and payable to "order" or "bearer," with these exceptions."

"Checks will not be returned to the drawer after their payment, but the depositary with whom the account is kept shall furnish the officer with a monthly statement of his deposit account."

Page 9:

"Collections

"Collectors and surveyors of customs, collectors of internal revenue, and receivers of public moneys, living in the same city or town with an assistant treasurer, or designated

depositary, must deposit their receipts at the close of each day. Officers at such a distance from a depositary that daily deposits are impracticable, must forward their receipts as often as they amount to $1,000, and at the end of each month without regard to the amount then accumulated."

"All collections must be deposited to the credit of the Treasurer of the United States, except moneys received by collectors of internal revenue from sales under Section 3460, Revised Statutes of the United States, or from offers of compromises when received prior to the acceptance of the offer, which must be deposited to the credit of the Secretary of the Treasury as heretofore."

[fol. 36] "District attorneys, marshals and clerks of courts who receive public moneys accruing to the United States from fines, penalties, and forfeitures, fees, costs (including costs in criminal suits for violations of the postal laws), forfeitures of recognizances, debts due the United States, interest on such debts, sales of public property, or from any other sources, will deposit the same in accordance with the foregoing paragraphs, except moneys accruing from customs (including navigation) and internal-revenue cases, which should be paid to the collector or surveyor of customs or collector of internal revenue of the district in which the case arose, and moneys accruing from civil postoffice suits, and fines in criminal cases for violation of the postal laws, which should be deposited to the Treasurer's credit for the use of the Post-Office Department."

Page 10:

"All moneys advanced from the Treasury to any officer or agent of the Government for disbursement, or coming into his hands, must be deposited to his official credit as such disbursing officer or agent, and drawn upon only in his official capacity."

Page 14:

"A marshal may appoint necessary deputies. He should employ only such a number as he has work for in serving process issued in well founded cases, rather than a large number for whom he has not sufficient work, but who are tempted to instigate prosecutions on frivolous or ground-

less charges for the sake of the fees to be earned. This, in the past, has been a great source of evil and must be remedied."

"Immediately upon receipt of these instructions, each Marshal will report to the Attorney-General the name and [fol. 37] address of each of his deputies, with the terms of the contract under which he serves. Hereafter when a deputy is appointed the Attorney-General must be notified, giving the name, location of the deputy, and the terms of the contract with him, and when any deputy is discharged, the Marshal should notify the department."

"The proportion of fees and emoluments which the deputy is to receive must be fixed definitely in advance. The practice that has obtained in some districts of making contracts with deputies on a sliding scale, so that the compensation of the deputy depends upon the total earnings of the marshal's office, rather than the service performed by him, thus managing to dispose of a surplus that would otherwise exist, is not warranted by law."

"The acts of a deputy are the acts of a marshal, who will be held strictly responsible for them. The marshal should carefully scrutinize the accounts of his deputies to see that all charges are legal, and that all services charged for have been performed as stated."

Pag- 28:

"The marshal and each deputy should make out a voucher for all services for which the United States is liable, payable from this appropriation, performed by such marshal or deputy during the quarter. The voucher of the Marshal for personal services should be No. 1, and should contain all charges for services of the marshal, except commissions on disbursements, which should not be included in the voucher, as they are charged separately in the account current."

"Each sheet must show the title of the case, the name of the officer making the service, the offense charged, the date of the issuance of the writ, by whom issued; if a warrant, by whom complaint was made, and his official title, if he have any, place and date of receiving the writ, when [fol. 38] and from what place travel to serve was made, date of service, place of service showing the county and distance and direction from the post office nearest the

place of service, and where return was made. Each page must contain fees earned in one case only. Only one side or page of each sheet must be used, the pages numbered, the date when each item of service was performed given on the left hand margin of the page (do not "ditto"), each item of service definitely stated, the items of charge on each page footed and the footing carried to the next page or into an abstract for that voucher. The pages of the voucher should follow consecutively that is, in the order of time as the several cases were disposed of. All the charges for services of a deputy during a quarter should be included in one voucher and where he renders service in a case in which he did not make the arrest, reference should be made to the voucher and page where the charge for arrest appears and to all vouchers which contain any charges in the same case. The several pages of a voucher should be neatly fastened together with the affidavit of the officer, and the footing of the voucher carried to the general abstract of the account."

"The following is a form for charging fees earned in serving a warrant, which is approved by the Attorney-General and the accounting officers of the Treasury:

Page 29 (Form):

"The United of America to ....., U. S. Marshal, Dr. for services by Deputy ....., in case of the United States vs. ..... Residence, ..., Offense charged, ..., Warrant issued, ..., 189.., by ..... U. S. commissioner at ..... Complaint made by ..... Warrant received by Deputy ....., at ....., 189.. Warrant executed ....., 189...., in ..... county, ... miles from ..... P. O. Warrant returned with the defendant, ... 189...., before U. S. Com-
[fol. 39] missioner ....., at .....

Dates : In the above case fees were earned and Dolls. 189——: Cts. expenses incurred, as follows:

---

1. Travel, in going only, to serve warrant, from ..... (travel actual and necessary) .... miles at 6 cents per mile.

2. Expenses incurred while endeavoring to arrest:
..... Dolls. ..... Cts.

.....

.....

Total .....

Maximum allowed by law for ..... days.

3. Serving warrant (defendant taken into custody).

4. Mileage, transporting self and prisoner ..... miles, and ..... guard ..... miles, 10 cents per mile each.

5. Actual expenses feeding prisoners, as follows:
..... Dolls. ..... Cts.
Total charged to account ——.

6. Committing defendant to jail temporarily .....

7. Transporting prisoner to jail at ..... miles at 10 cents per mile for deputy, prisoner, and ..... guards.

8. Committing Defendant .....

9. Discharging defendant on bond .....

[fol. 40] 10. Discharging defendant .....

11. Attendance of Deputy ..... before Commissioner ..... days .....

12. Serving ..... subpœnas for plaintiff's witnesses.

Memo. of subpœna service.

Issued Received Travel Place of Service Served on

.....

.....

.....

Amount carried to abstract .....

Remarks ..... Voucher No. ..... page ....."

Page 35: (Affidavit of Deputy to Voucher).

"The deputy must swear to his voucher. The affidavit should be in the following form:

..... District of .....
....., deputy United States marshal for said district, being duly sworn, deposes and says that the above account for ..... dollars and ..... cents for

services performed and expenses incurred by him from ..... to ....., 189...., is true and correct; that the services therein charged for were actually and necessarily rendered; that the expenses charged were actually and necessarily incurr-d and paid by him in lawful mon-y; that in each case where an arrest was made the defendant was taken before the nearest circuit court commissioner, or the nearest judicial officer having jurisdiction under existing laws, and that all mileage charged is [fol. 41] for travel made with cost to the marshal or deputy.

..... Deputy Marshal.

Sworn to and subscribed before me this the .. day of ...., 189.....

.....

Clerk.

"This affidavit must be executed before an officer having general authority to administer oaths, and must be on or attached to the last page of the voucher. It is not necessary to swear to each page of the voucher, but one oath as to all the services and charges of the deputy during a quarter is sufficient. If any fees for making arrests or for travel are made by the marshal, he also must make affidavit as to the defendants having been taken before the nearest commissioner or judicial officer, and that the travel was not without cost."

Page 39:

"The total amount paid deputies as shown by Abstract A should be carried into the credit side of the emolument return under the head, "Paid deputies for their services and expenses as per accompanying Abstract A".

Deputies must receipt for the amount paid them as fees and expenses, which receipts should be numbered in the order their names appear in the abstract. Receipts may be in the following form:

Received of ....., United States marshal for the ..... district of ....., dollars and ..... cents in full for my services and expenses as a deputy marshal, for the period from ..... to ..... 189.....

.....

Deputy.

[fol. 42] No credit can be allowed a marshal for a payment to a deputy who has not been regularly appointed and taken the oath of office prescribed by section 782, Revised Statutes.

No more than 75 per cent of the net earnings of a deputy can be paid, and the proportion of fees and emoluments which the deputy is to receive must be fixed definitely in advance. This proportion, whether one-half, two-thirds, etc. of the net earnings, must be shown in Abstract A.

The Attorney General has prescribed a limit of $3,000 to be paid any deputy as his share of net earnings during any calendar year, or that rate for any part of a year. If a deputy's net earnings during the first half of a year are $2,500, and he should not actively engage in the performance of duties during the entire second half of the year, he should only be paid an amount in proportion to the time actively employed at the rate of $3,000 per annum or the rate fixed for h-s compensation."

The following excerpts from Instructions to United States Marshals, Attorneys, Clerks and Commissioners, dated January 1, 1899:

"In the performance of your duties and the rendering of your accounts, you will observe the rules and regulations, and will be guided by the instructions set forth herein.

These instructions will take effect January 1, 1899, and supersede instructions to United States Marshals, Attorneys, Clerks and Commissioners, dated July 1, 1895, Instructions to United States Marshals and Attorneys, dated July 1, 1896, and Instructions to United States Commissioners, dated June 1, 1897.

The act of Congress of May 28, 1896, and the practice [fol. 43] and forms consequent upon the enactment thereof, make imperative a full comprehension of these instructions, and you are directed to comply strictly with them.

Respectfully

John W. Griggs, Attorney General."

Pages 25, 26, 27, 28:

"Before entering upon the duties of his office each field deputy must take the oath of office prescribed by Department Form 10.

"Immediately upon the appointment of a field deputy, under Section 11 of the above act, the marshal must make the required report to the Attorney General, forwarding therewith the oath of the appointee.

"The marshal in his report to the Attorney General of an appointment or appointments under section 11 of this act, must state the "facts as distinguished from conclusions" i. e., he must show specifically how the public interest will be promoted thereby.

"Each such report must also state:

1. The name and age of the proposed employee.

2. His present residence and occupation.

3. Where it is proposed to fix the place of his official headquarters.

4. The territory which will be covered by him in the service of process.

"Marshals should exercise great care in the selection and employment of field deputies.

"Field deputies must be located at various places [fol. 44] throughout the district, with a view to economy and efficiency in the conduct of the public business.

"Appointment of field deputy marshals other than as the public interest may require will be canceled.

"Before entering upon his official duties each field deputy must take an oath of office in the manner and form as prescribed for office deputies.

"The requirements as to the execution of a new oath by a field deputy, upon his retention in office by the successor of the marshal who appointed him, or whenever the marshal is required to take a new oath, are the same as in the case of an office deputy (p. —, par. —, supra).

"Whenever a field deputy is employed or suspended or dismissed from the service, or whenever a change is made in his official headquarters, the marshal will at once communicate the facts to the Department in writing. There should be no delay in so notifying the Department.

"When an office deputy or a field deputy is removed or dismissed because of official misconduct he must not again be employed in any capacity wherein his compensation is to be paid by the United States, unless specific authority has first been obtained from the Attorney General.

"The accounts of field deputies for fees earned and expenses incurred in accordance with law are payable from the appropriation "Salaries, fees and expenses of marshals, United States Courts."

"The marshal will furnish to each of his deputies a sufficient supply of Form 32, and will require them to make reports upon such forms to the main office as soon as any service upon which the deputy is engaged has been completed.

"The marshal will use these reports in making the [fol. 45] proper entries on the dockets and also in preparing the original and duplicate copies of his accounts.

"All charges for services of a deputy during a quarter payable from this appropriation, whether earned in cases to which the United States is a party or not, must be included in one voucher.

"Each sheet must show:

1. The name of the deputy.
2. The title of the case.
3. The offense charged (section of statute).
4. The nature of the writ (whether warrant, capias, etc.).
5. The date and place of issuance of the writ.
6. By whom issued.
7. If a warrant, by whom complaint was made and his official title, if he have one.
8. Place and date of receipt of writ by deputy.
9. Date of service.
10. Place of service, showing the county, and distance and direction from nearest post-office to place of service.
11. Date return was made.
12. Before what officer.
13. From what place travel to serve was made.
14. If a civil writ, the nature of the cause of action must be shown. State in case of subpoena place issued, place received and where served. In a case wherein the United States is a party it should be shown whether each item of service is on behalf of the United States or the other party.
15. How case was disposed of.

"Each page must contain fees earned in one case only. Only one side or page of each sheet must be used, the pages numbered, the date when each item of service was per-

formed given on the left-hand margin of the page (do not "ditto"), each item of service definitely stated, and the items of charge on each page footed.

"Charges for subpoena service should be indicated on [fol. 46] the bottom of the page upon which the warrant in the case is charged.

"The several pages of a voucher and the affidavit of the officer should be neatly fastened together, and the footing of each page carried to the abstract of the voucher.

"The pages of the voucher should be arranged chronologically, beginning with the case in which the first writ was served.

"Where a deputy renders service in a case in which he did not make the arrest, reference should be made to the voucher and page where the charge for arrest appears.

"When these accounts are presented to the marshal he should satisfy himself of their correctness and pay the amount due, namely, the expenses allowed by section 11 of the act of May 28, 1896, and subsistence of prisoners before commitment, and three-fourths of the gross fees earned, not to exceed the rate of $1,500 per fiscal year for any part of a fiscal year, except where in special cases the maximum co-pensation which a deputy may earn has been increased in accordance with said section, when payment may be at such increased rate. But in no case shall a marshal pay a deputy more than three-fourths of the gross fees earned by him.

"A field deputy marshal who is entitled to compensation from fees not exceeding $1,500 per annum can be paid only at that rate for a period less than a year, but the surplus earnings of one quarter may be paid to make up a deficiency in any other quarter of the same fiscal year. (III Comp. Dec. 226):

"The marshal should enter on each page of the voucher his docket number of the case.

[fol. 47] "The amount expressed in the receipt of the deputy must be paid him in full, in lawful money, by the marshal. The payment should be made by check. The examiners of this department will report promptly to the Department the facts as to any Marshal who has not paid his deputies the full amounts designated in their receipts attached to the marshal's accounts.

"After payment the voucher should form part of the marshal's regular account under the appropriation "Salaries, fees and expenses."

"Field deputies must furnish receipts in the manner and form and for the expenses indicated below:

"Receipts for subsistence must be furnished.

"Receipts for single meals are required.

"Receipts for team hire must be furnished."

"Each receipt must state, specifically, the item of expense; also whether the expense incurred was for the deputy marshal or for a prisoner.

"All receipts must be written and signed in ink or indelible pencil.

"The field deputy of a marshal is entitled under section 11 of the act of May 28, 1896, to three-fourths of the fees formerly allowed to a marshal under section 829, Revised Statutes, and he is also entitled, as were marshals, to charge railroad fare as a part of his expenses, within the limits of $2 per day, in endeavoring to arrest. (III Comp. Dec. 51.)

"When the fees of a field deputy marshal for services rendered during a fiscal year amount to $1,500 before the end of the year, he must continue to serve during the [fol. 48] whole year in order to receive the maximum compensation of $1,500 per annum fixed by law, his expenses while so serving being covered by actual expenses allowed in lieu of mileage when process is served, or actual expenses, not exceeding $2 per day, on an unsuccessful endeavor to arrest. (III Comp. Dec. 575.)

"The compensation of a field deputy marshal for all his services, in cases between individuals as well as in cases to which the United States are a party, is paid by the United States, and is governed entirely by the statutes fixing the fees of such officers without relation to the fees which may actually be paid by a private litigant for the services rendered by the deputy and which are covered into the Treasury.

"A field deputy marshal is not entitled to a fee for any services rendered on behalf of a party to a suit unless there is a fee specifically provided by law for that particular service. (III Comp. Dec. 733).

"A marshal is not authorized to reimburse a field deputy for expenses incurred in caring for and preserving property seized under a writ of replevin, there being no pro-

vision of law for the payment of such expenses. (Comp. to Cooper, E. Ark., May 26, 1898.)

"The account of a field deputy marshal for fees earned and expenses incurred in the service of a warrant should be rendered on Form 26.

"The total expenses incurred in endeavoring to arrest should be given, but only $2 of the expense for each day should be charged in the account.

Page 29:

[fol. 49] "No expense can be allowed as an expense endeavoring to arrest incurred after the arrest has been made. The maximum allowance for any one day in double fee districts is $2 the same as in single fee districts. Expenses endeavoring to arrest can be allowed even though the arrest is not made, but in such cases it must be shown just what was done by the officer on each day.

"When prisoners are placed in jail, no fees or charges of the jailer should be paid from the appropriation "Salaries, fees and expenses." Such charges are properly payable from the appropriation for support of prisoners, United States courts, upon vouchers rendered by the jailer in the usual manner.

"Expenses incurred by a marshal and his deputy in providing for a prisoner in his custody, except while placed in jail, until the prisoner has been formally committed, should be paid from the appropriation "Salaries, fees and expenses of marshals" after the prisoner has been committed, and while temporarily placed in jail, the appropriation for support of prisoners is applicable to expenses for his support. (IV Comp. Dec., 525.)

"Prisoners in the custody of an officer must be subsisted in the most economical manner. Extravagant charges will not be allowed.

"Whenever a deputy marshal renders an account for services in a case and charges are made in the same case in another place, either in his own voucher or that of another deputy, reference must be made to the voucher and page where such other charges appear.

"A field deputy marshal is entitled to charge a per diem fee of $2 for his attendance before commissioners upon examination of prisoners charged with crime. When he [fol. 50] attends in more than one case in a day before the

same commissioner he is entitled to but one fee for attendance.

"Per diems of more than two deputies for attendance in the same case on the same day will not be allowed. Usually not more than one officer is necessary, and when more are in attendance the necessity must be shown. If the hearing is held at the place of the marshal's or an office deputy's official residence and the attendance of more than one deputy is necessary, the marshal or one of the office deputies should attend. An explanation will be required from a marshal or office deputy of his failure to so attend."

Page 32:

"In like manner an incoming marshal, making payments on account of services and expenses of his predecessor's deputies, will make reference to the record of service filed with the outgoing marshal's accounts, and transmit with his account current simply receipts for the actual payments so made to said deputies."

Page 33:

"But a field deputy may elect to receive actual expenses in lieu of mileage. In such event the compensation of the field deputy would be the same is in case 1-a, p. 32. But as the mileage exceeds the expenses, the fact that the field deputy elected to take actual expenses would not affect the amount to be collected from the litigants and paid to the clerk."

"In those districts in which the payment of double fees to marshals has been authorized by general laws of permanent application, to wit: Oregon, Nevada, New Mexico, Arizona, Idaho, Wyoming and North Dakota, the marshals shall continue to collect double fees from litigants in suits between individuals and corporations; but there shall be [fol. 51] paid to field deputy marshals in said districts three-fourths only of single fees."

Page 34:

"Marshals and deputy marshals in the districts of Oregon, Nevada, New Mexico, Arizona, Idaho, Wyoming and North Dakota when rendering their accounts and reports of fees earned on Forms 270, 25, 26, 34, 55, 68, 194; 195 etc.;

and when making payments to clerks of courts of fees and costs collected, and reporting the same upon amended Form 72, will report and pay over double fees."

"As by the Act of May 28, 1896, a field deputy marshal receives from the United States his compensation for all services, he is required to furnish in support of his accounts the same receipts and vouchers for expenses incurred in cases in which the United States are not a party as are required by established practice in cases in which they are a party. (III Camp. Dec. 156.)."

"The question of the fees to be allowed to a field deputy marshal for the service of process does not involve the question of the fees to be charged private litigants, the latter being for the determination of the court upon the taxation of the costs (III Comp. Dec., 239)."

Page 38:

"The amount of fees which a field deputy is to receive is prescribed by the clause in section 11 of the act of May 28, 1896, and is the same in all cases whether the United States are a party or not. This compensation does not depend upon the amount which may be taxed either against the defendant in a criminal case, or the unsuccessful party in civil proceedings, which is governed by the provisions of section 6, and is to be collected and paid to the clerk of the court. It is clear, therefore, that a field deputy marshal is not entitled to receive more than one mileage for travel on any one trip."

[fol. 52] "What amount should be charged private parties in such cases is a question for the determination of the court upon the taxation of costs. (III Comp. Dec. 239)."

Page 50:

"Any disbursing officer or agent drawing checks on moneys deposited to his official credit must state on the face or back of each check the object or purpose to which the avails are to be applied."

"Checks will not be returned to the drawer after their payment, but the depositary with whom the account is kept will furnish the officer with a monthly statement of his deposit account."

Page 51:

"If a marshal desires the privilege of depositing public moneys in a national bank depository he should make application to the Secretary of the Treasury to be specially authorized to do so, stating the facts upon which he bases his request, forwarding his application to this Department for transmission to the Secretary of the Treasury."

Page 52:

"A marshal will not ask for the return of checks drawn by him in his official capacity. If the depositary should return such checks, the marshal is directed to transmit the same again to the depositary, with the request that he be furnished with a statement of his deposit account in lieu thereof.

"Marshals are directed to make all payments by official check, except when specially authorized by the Secretary of the treasury to hold money at their own risk."

"Each juror, deputy marshal, or other public creditor [fol.53] whom it is the duty of the marshal, as disbursing officer, to pay, must be paid by check as above."

Page 63:

"All money advanced by the United States is for the payment of its creditors, and whoever uses public funds for private purposes, even temporarily; is guilty of embezzlement. (See secs. 3620 and 5488, Rev. Stat.) The object of permitting marshals to hold money otherwise than in a public depository is to facilitate the payment of public creditors where it is impracticable to make all payments by check, and the authority from the Secretary of the Treasury to keep on hand a certain amount of money does not convey the right to use that money in any other way than for the payment of the legitimate expenses of the Government."

The Government objected to the introduction of the foregoing excerpts from the books of regulations upon the grounds that they were irrelevant and immaterial; the objection was overruled and an exception was noted and allowed.

GEORGE F. WHITE, sworn for the Plaintiff, testified:

I am the Clerk of the United States Court for the Middle District of Georgia, and my first position with the Government was that of Deputy United States Marshal of the Southern District of Georgia with headquarters at Macon, having been appointed on September 29, 1889, holding this position for practically thirteen years, and was on a fee basis some of that time, living in Macon devoting all of my time to the duties of the office. I was to a certain extent familiar with conditions prevailing in the Northern District with reference to the duties performed there by deputy marshals and knew some of the deputies working in that District. It was customary for the deputies to devote their [fol. 54] full time to the duties of the office in both the Southern and Northern Districts. I knew Mr. F. D. Dismuke in those days and remember that he became a Deputy Marshal during Cleveland's administration between 1892 and 1896. He was working out of Atlanta and was in Columbus for a while; and so far as I know, he devoted all of his time to the duties of the office.

I am in a general way familiar with the duties of deputy marshals at present. They were put on a salary basis in 1904 or 1905. There is no material difference in the duties performed and the work done now by a deputy marshal than before they were put on a salary basis. When I went on in 1889 we were getting sixty per cent of the gross fees, and the marshal was getting forty per cent, and were paid by checks drawn on the Merchants National Bank. In 1896 the marshal was placed on a salary, and the deputy marshals then became known as field deputy marshals, and their fees were fixed at seventy-five per cent of the gross earnings. In 1903 I was made United States Marshal, and after consultation with the Attorney General, the deputy marshals were put on salaries in the Southern District. In arriving at what salary they should draw, we added up the gross fees of all the deputy marshals in the Southern District of Georgia and arrived at what their salaries should be on that basis. Up to 1896 we were making $1500.00 a year, but by the consent of the Attorney General, we could get $2500.00. The Attorney General then took mine off, and I went to $3750.00. In 1896 my recollection is they did away with the Merchants National Bank of Savannah, and all of the checks were drawn on the Treasury Dep-tment.

The marshal collected the costs and deposited it to the credit of the Treasury of the United States and gave the deputy marshals official checks on the Merchants National Bank at Savannah. There was no difference in the work which a deputy marshal did after he went on a salary basis except that he could not act as a bailiff, and could not get [fol. 55] additional compensation for his work; and if he went off with the marshal with the prisoners, he simply got his actual expenses, and did not get any guard fee; but the duties he performed were exactly the same. The marshal made the same requisitions for advancements that he makes now; they would grant him an advance up to the amount of his bond; his bond was $2500.00. He would make a requisition for advances, and there would be so much for fees of marshals, so much for bailiffs, so much for jurors, so much for witnesses, so much for miscellaneous expenses. They would grant him advances up to the amount of his bond in that depositary—the first we knew about it they sent us a copy of deposit slip with the Merchants National Bank of Savannah. Now they send you a slip from Washington showing that it has been deposited in the Treasury —the only difference between then and now. The law provides the amount of compensation for a marshal or deputy for each particular service such as making an arrest, serving a process, etc. The voucher which the deputy marshal made out showing the fees he had earned called for the amounts so fixed by law; and the deputy marshal, in his account against the United States, was paid these fees whether or not the Court taxed the costs against the defendant when he was convicted and whether or not these fees and costs were ever collected from the parties litigant or the defendant in the criminal case against whom they were taxed.

Cross-examination:

We made up a list, I will tell you how it was done. The marshal selected so many deputies at Macon a new marshal coming in, say the Republicans got out and the Democrats come in, because I had to work with two or three of them. We had to write the Attorney General whom we were going to appoint and why we were going to appoint them. We had to give a sort of life history of a man and why it was necessary to have that many deputies at such and such a

place; and when we had made the appointment, it had to [fol. 56] be confirmed by the Attorney General, and we sent him a copy of the oath of office. I don't know whether the marshals made the trades with the deputies or not, for that is something that happened prior to 1889. We was fixed by the Attorney General at sixty per cent. We were employed then just exactly like they are now; the marshal selected his deputies and let them take the oath of office, sending a copy of the oath and his reasons for appointing them, together with their qualifications and the necessity for their appointment, to the Attorney General. If he approved it, they stayed on; if he didn't, they went off. Prior to 1896 the marshal paid them with a check drawn on the Merchants National Bank, marked down at the corner "Fees and expenses of marshal", the check being signed by the marshal and drawn on his public account, drawn just the same as they are now except they are now drawn on the Treasury. They were paid out of the money advanced by the Government to the marshal for fees and expenses of the marshal, just like witnesses were paid, for fees and expenses of witnesses. Prior to 1896 if a marshal got dissatisfied with one of his field deputies, he could fire him without asking the Attorney General just like he can now. During the time I was marshal there was no deduction made from my salary for the Civil Service Retirement Act.

F. D. DISMUKE, the plaintiff, sworn, testified:

I was first appointed as a Deputy Marshal in the Northern District of Georgia and devoted all my time to the duties of the office. I had no other income or occupation. I served for a certain period as a Deputy Marshal in the Southern District, also devoting all my time to the duties of the office, having no other income or employment. It was customary in both Districts during the times of my service as a field deputy marshal for such deputies to devote all of their time to the duties of the office.

[fol. 57] Cross-examination:

I was what was known as a field Deputy Marshal.

Upon the conclusion of the evidence, Mr. Bootle, of counsel for the plaintiff, made the following motion:

PLAINTIFF'S MOTION FOR JUDGMENT

"For a finding in favor of the plaintiff on the pleadings, stipulations of facts and evidence, and we base our motion upon the grounds that the evidence, pleadings and stipulations of facts demand a finding and judgment in favor of the plaintiff."

Mr. Rawls, in behalf of the defendant, moved:

DEFENDANT'S MOTION FOR JUDGMENT

"For a judgment in favor of the defendant upon the grounds that the pleadings, the stipulations and the undisputed evidence show that the plaintiff is not entitled to the relief sought."

This motion in behalf of the defendant was by the Court overruled, and judgment was thereupon entered in favor of the plaintiff for the full amount claimed. Exceptions to said judgment were noted and allowed.

The United States then and there excepted to the rendition of the judgment in favor of the plaintiff, and here and now excepts, and assigns error upon the grounds set out in the assignment of errors heretofore filed in said case.

T. Hoyt Davis, United States Attorney, H. G. Rawls, Assistant United States Attorney, Attorneys for Appellant.

[fol. 58] Acknowledgment of Service

Due and legal service of the foregoing bill of exceptions acknowledged. Copy received, and all other and further service waived; and lodgment in the Clerk's office and notice of application to the Court for approval is hereby waived.

Jan. 17, 1935.

Carlisle & Bootle, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT

ORDER APPROVING BILL OF EXCEPTIONS

The foregoing bill of exceptions in the above stated case is approved as correct, and is certified to be all of the evi-

dence material to this appeal and to contain all of the rulings of the Court necessary to a clear understanding of the errors complained of.

This the 17th day of January, 1935.

Bascom S. Deaver, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed Jan. 17, 1935

To the Honorable George F. White, Clerk of the District Court of the United States for the Middle District of Georgia:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal entered [fol. 59] in the above entitled cause, and to include in such transcript of record the following parts thereof, to-wit:

1. The petition of the plaintiff, Frederick D. Dismuke;

2. All amendments to plaintiff's petition;

3. The answer of the defendant, together with any and all amendments that may have been filed thereto;

4. The demurrer of the defendant, together with the order overruling the same;

5. The judgment of the Court in favor of the plaintiff;

6. The petition for appeal and assignment of errors, together with acknowledgment of service thereon;

7. Citation with acknowledgment of service thereon;

8. Bill of exceptions approved by the Court;

9. This præcipe with acknowledgment thereon; said transcript of record to be prepared as required by law and the rules of the United States Court of Appeals for the Fifth Circuit.

T. Hoyt Davis, United States Attorney. H. G. Rawls, Assistant United States Attorney, Attorneys for Appellant.

[File endorsement omitted.]

[fols. 60 & 61] Acknowledgment of Service

Due and legal service of the foregoing præcipe acknowledged. Copy received and all other and further service waived.

This the 17th day of January, 1935.

Carlisle & Bootle, Attorneys for Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

Recital as to Citation

Citation omitted from the printed record the original thereof being on file -n the office of the Clerk of the U. S. Circuit Court of Appeals.

[fol. 62] In United States District Court

[Title omitted]

Motion for Order Permitting Defending of Appeal Without Prepayment of Costs

Comes now the plaintiff in the above stated case and says that he prosecuted said case successfully in this court, obtaining a judgment in his favor, and that the United States of America has appealed said case to the United States Circuit Court of Appeals for the Fifth Circuit, all of which appears from the records of said case on file in the Clerk's Office of this Court.

Petitioner now moves the court to pass an order allowing the petitioner to defend to conclusion said appeal in the United States Circuit Court of Appeals for the Fifth Circuit, including all appellate proceedings, without being required to prepay fees or costs and without being required to print his briefs to be used in the appellate court and without being required to give security therefor. Petitioner bases this motion upon the statement under oath, in writing, attached hereto as Exhibit "A", which is to be filed with this motion in the Office of the Clerk of this Court.

(Signed) Carlisle & Boothe, Attorneys for Petitioner.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF F. D. DISMUKE

GEORGIA,
Thomas County:

In person appeared before the undersigned attesting officer, Frederick D. Dismuke, who being duly sworn, deposes and says:

Deponent is a citizen of the United States and is the plaintiff in the above stated case, which he was entitled to commence in this Court and in which he asked for and obtained a judgment against the United States of America for certain annuity benefits under the laws of Congress which provide for the retirement of civil service employees, enacted May 22, 1930, and under the various amendments to said legislation, including the provisions of Section 8-A of the Act of June 16, 1933. From said judgment the United States of America has prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

Deponent desires to defend to conclusion said appeal but, because of his poverty, he is unable to pay the cost of said appeal or to give security for the same and is unable to pay the cost of printing his brief to be filed to the Circuit Court of Appeals or to give security for the same.

Deponent believes he is entitled to the redress he seeks [fol. 64] in said appeal; namely, the affirmance of the judgment which he obtained in the trial court.

Deponent makes this affidavit to be used as the basis of a motion for an order allowing him to defend said appeal without being required to prepay fees or costs or to give security therefor and allowing him to defend said appeal without being required to print the briefs which he proposes to file in said Circuit Court of Appeals.

(Signed) Frederick D. Dismuke.

Sworn to and subscribed before me this 21 day of February, 1935.

(Signed) T. T. Caldwell, Notary Public, Thomas County, Georgia. State of Georgia, at Large. (Seal.)

Commission expires Dec. 4, 1937.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO PROCEED WITHOUT PREPAYMENT OF COSTS

Frederick D. Dismuke, the plaintiff in the above stated case, having filed in this court a statement under oath, in writing, that he is a citizen of the United States and that because of his poverty he is unable to pay the costs of defending the appeal which has been perfected in the above stated case, which case he was entitled to commence and did commence in the court below and, that because of his poverty, he is unable to give security for said costs and that he believes that he is entitled to the redress that he seeks in defending said appeal, in which statement he sets forth briefly the nature of said cause of action and appeal.

And the said Frederick D. Dismuke having fully complied with all of the provisions of the statute in such cases provided.

It is ordered that said Frederick D. Dismuke be and he is hereby allowed to defend to conclusion said appeal in the United States Circuit Court of Appeals for the Fifth Circuit, including all appellate proceedings, without being required to prepay fees or costs and without being required to give security therefor and without being required to print his briefs to be filed in the appellate court.

[fol. 66] In open court this 23 day of February, 1935.

(Signed) Bascom S. Deaver, U. S. Judge. (Signed) Carlisle & Bootle, Attorneys for Petitioner.

[fol. 67] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7675

UNITED STATES OF AMERICA

versus

FREDERICK D. DISMUKE

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—April 9, 1935

On this day this cause was called, and, after argument by William S. Ward, Esq., Attorney, Department of Justice, for appellant, and W. A. Bootle, Esq., for appellee, was submitted to the Court.

[fol. 69] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7675

UNITED STATES OF AMERICA, Appellant,

versus

FREDERICK D. DISMUKE, Appellee

Appeal from the District Court of the United States for the Middle District of Georgia

(April 19, 1935)

Before Bryan, Foster and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed April 19, 1935

HUTCHESON, Circuit Judge:

The suit was brought under the Tucker Act, to recover amounts claimed to be due plaintiff for accrued monthly installments on a Civil Service annuity under C. 101, Sec. 8a, Act of June 16, 1933, 48 Stat. 305, U. S. C. A. Title 5,

Section 692d, and for a declaratory judgment as to future installments.[1]

[fol. 70] The complaint was that though plaintiff had made his application as required, and had complied with all the other requirements of the statutes, his claim had been wrongfully and arbitrarily rejected on the ground that he did not render thirty years of allowable service, because his service as field deputy marshal from December 16, 1895 to April 30, 1902, could not count as allowable service as "field deputy marshals are regarded as employees of the marshal and not of the United States." The United States, insisting that the determination of any right or claim plaintiff may have has been exclusively remitted to administrative discretion and action, and that no consent to sue in respect of it has been given, objected to the jurisdiction of the court. It insisted too, that if there was jurisdiction to consider the claim it ought to be rejected, because the administrative adjudica-

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[1] Sec. 692d Involuntary Separation. "(a) Whenever at any time hereafter prior to July 1, 1935, any employe of the United States or the District of Columbia to whom this chapter applies, who has an aggregate period of service of at least thirty years computed as prescribed in section 695a of this chapter is involuntarily separated from the service for reasons other than his misconduct, such employe shall be entitled to an annuity computed as provided in section 694a of this chapter payable from the civil service retirement and disability fund less a sum equal to 3½ per centum of such annuity; Provided, that when an annuitant hereunder attains the age which would have been the retirement age prescribed for automatic separation from the service applicable to such annuitant had he continued in the service to which retirement age, such deduction from the annuity shall cease. If and when any such annuitant shall be reemployed in the service of the District of Columbia or the United States (including any corporation the majority stock of which is owned by the United States) the right to the annuity provided by this section shall cease and the subsequent annuity rights of such person shall be determined in accordance with the applicable provisions of retirement law existing at the time of the subsequent separation of such person from the service."

tion of it was right. The District Judge thought the claim justiciable under the Tucker Act. He tried it under that Act and awarded plaintiff the judgment he sued for, not only a money judgment for the installments he claimed had accrued, but a declaratory judgment establishing his right to future installments. This appeal attacks the jurisdiction of the court to render any judgment. It attacks its jurisdiction to render a declaratory judgment in a proceeding under the Tucker Act. It attacks the judgment as erroneous on the merits, if rendered with jurisdiction, because it [fol. 71] allowed plaintiff to compute as part of the necessary thirty years, the seven years he served as deputy field marshal.

We think it clear that the jurisdictional points are well taken. The District Court of the United States as to claims under the Tucker Act, sits as a special tribunal exercising jurisdiction concurrent with the Court of Claims. U. S. vs. Pfitsch, 256 U. S. 547. When so sitting, it sits only to hear claims for actual damages on money demands. Perry vs. U. S., — U. S. —; Eugene Nortz vs. U. S., — U. S. —; Grant vs. U. S., 7 Wall. 331; Marion & Rye Ry. vs. U. S., 270 U. S. 280. Demands, with certain named exceptions, founded upon the Constitution and laws of the United States, upon a regulation of an executive department, or any contract, express or implied, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, of equity, or of admiralty, if the United States were suable.

The United States argues that whether the civil service retirement annuity plaintiff is suing for be regarded as contractual, as providing for insurance benefits, or gratuitous, as part of a pension scheme; whether it be regarded as founded on a law of Congress, or upon a regulation of an executive department, it is perfectly plain from the whole structure of the plan "for the retirement of civil service employes" and the provisions of the Acts putting it into effect, that no suable right is granted by those Acts, but on the contrary, their operation and application is a matter of administrative discretion and action, which may not be interfered with or controlled by court action. In short, that such claim or right as these statutes give is not a suable right, but one for administrative determination. It argues that such a claim stands as do applications for reinstate-

ment of lapsed policies under the World War Veterans Act, Meadows vs. U. S., 281 U. S. 271; claims to review special assessments of war and excess profits taxes, Wil-
[fol. 72] liamsport Wire Rope Co. vs. U. S., 277 U. S. 551; claims for additional compensation for transportation; U. S. vs. Atchison, Topeka & Santa Fe Ry., 249 U. S. 451; and claims in compensation cases, Silberschein vs. U. S., 266 U. S. 221; U. S. vs. Williams, 278 U. S. 255, and as those stood under the Act of March 3, 1885, providing compensation for losses of personal property suffered by officers in the army. U. S. vs. Babcock, 250 U. S. 328, entitled to purely administrative remedies to the exclusion of the courts. It argues that a consideration of the retirement legislation leaves no doubt of the Congressional intent to commit its administration to the executive processes and officers the Act names.

Beginning in 1920, the Congress instituted a complete administrative plan for the retirement on pay of civil service employes. This plan prescribes who should be eligible, fixed classes and the amounts applicable to each class. Provision is made for a deduction from the basic salary of each employe covered by the Act, in accordance with the procedure prescribed by the Comptroller General to be deposited in the Treasury "to the credit of the civil service retirement disability fund." Provision is made, too, for crediting these deductions to the employe's individual account, and for the repayment of such amounts under certain conditions. Sec. 703a, U. S. C. A., Title 5, provides that applications for annuities shall be in such form as the Commissioner of Pensions prescribes, and shall be supported by certificate from the head of the department in which the applicant has been employed. Sec. 717, U. S. C. A. Title 5, provides, "upon receipt of satisfactory evidence the Commissioner of Pensions shall forthwith adjudicate the claim of the applicant and if title to an annuity be established, a proper certificate shall be issued to the annuitant under the seal of the Department of the Interior." There is a provision, too, that any employe coming within the provisions of the retirement act shall be deemed to consent and agree to the deductions from his salary, and that pay-
[fol. 73] ment of the salary less such deductions shall be an acquittance of all claims and demands for all regular services, except the right to the benefits which they may be

entitled to under the retirement act. It is provided that the Civil Service Commission shall keep such record of appointments, transfers, etc., as may be deemed essential to the proper determination of rights under the retirement act, and shall furnish the Commissioner of Pensions such reports therefrom as he shall from time to time request as necessary to the proper adjustment of any claim for annuity. Provision is made for the appointment by the Commissioner of Pensions with the approval of the Secretary of the Interior, of three actuaries, to recommend to the Commissioner of Pensions such changes as may be from time to time necessary to protect the public interest and maintain the system on a sound financial basis, and to prepare tables for the Commissioner of Pensions for the purpose of computing annuities. By Sec. 708a, Title 5, it is provided that none of the moneys mentioned in any of the sections of the retirement act shall be assignable, either in law or equity, or be subject to execution, levy or attachment, garnishment or other legal process. Sec. 693a, Title 5, U. S. C. A., specifying who are eligible employees, provides, "this group shall include only those employes whose tenure of office is not intermittent or of uncertain duration." Sec. 707a, Title 5, U. S. C. A., provides, "for the purpose of administration, except as otherwise provided herein, the Commissioner of Pensions, under the direction of the Secretary of the Interior, is authorized and directed to perform, or cause to be performed, any and all acts and to make such rules and regulations as may be necessary and proper for the carrying of the provisions of the Act into effect. An appeal to the Secretary of the Interior shall lie from the final action or order of the Commissioner of Pensions affecting the rights or interests of any person or of the United States, the procedure on appeal to be as prescribed by the Commissioner of Pensions with the Sec-
[fol. 74] retary's approval." In addition, this section requires that the Commissioner of Pensions make a detailed comparative report annually as to receipts, disbursements and annuities, and that the Secretary of the Interior shall submit annually to the Bureau of the Budget estimates of the appropriation necessary to finance the retirement disability fund and to continue the said sections in full force and effect.

Appellee insists that by the Tucker Act Congress has given its consent generally that the United States be sued in all cases of this kind, and that no restriction upon the right to sue can be spelled out of the elaborate provisions for the setting up and administration of this plan. He argues that the provisions for deductions from their salaries and the other general provisions of the Act indicate an intent to create a contractual right entitling claimants to the judgment of a court. He argues, too, that even if it be considered that Congress has remitted, whether he is entitled to the annuity he claims, to the primary determination of administrative officers, and he would have no right of suit to control or compel their discretionary action, U. S. vs. Black, 128 U. S. 40; Works vs. Rives, 267 U. S. 175; U. S. vs. Williams, 278 U. S. 255, there is no question of discretion involved here. The facts he says, are admitted, the failure to act on those admitted facts is the failure to take that non-discretionary action which may be controlled by court order. Medbury vs. U. S., 173 U. S. 492; McLean vs. U. S., 226 U. S. 374; U. S. vs. Loftin, 249 U. S. 442.

We cannot agree with appellee that he may sue upon his claim. We think the legislation [shows, in the clearest kind of way, an intent to provide a general plan to be exclusively administered by those the statutes place in charge of it, an intent to provide only an administrative remedy. That such claims are intended to be, as far as their suability as claims is concerned, entirely withdrawn from court action. The fact that no other instance of an [fol. 75] attempt to control the administration of this plan and the fund provided by it by court action made during the fifteen years the plan has been in existence has been cited to us, tends, we think, to further support this view. Whether one whose right to an annuity certificate has been favorably adjudicated by the Commissioner may have mandamus to compel its issuance to him, or one to whom such a certificate has been issued, may, by mandamus, compel the payment to him of the moneys for which his certificate calls. Smith vs. U. S., 57 Fed. (2d) 998, or whether these claims are entirely withdrawn from judicial action as are decisions rendered by the administrator of veterans' affairs under the Act of March 20, 1933, Chap. 3, 48 Stats. 9, Lynch vs. U. S., 292 U. S. 587, is not before us. This is a suit

against the United States, and not a mandamus suit against an officer. Besides, we think it quite clear that there are matters, not of law, but of administrative discretion in applying the Act, involved in determining the right of one claiming an annuity under the plan which have not been resolved in plaintiff's favor, and the resolution of which may not be controlled by court action. The suit should have been dismissed.]

The judgment is reversed, and the cause is remanded with directions to dismiss the claim.

Foster, Circuit Judge, dissents.

[fol. 76] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7675

UNITED STATES OF AMERICA

versus

FREDERICK D. DISMUKE

JUDGMENT—April 19, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the claim.

"Foster, Circuit Judge, dissents."

[fols. 77-81] Petition for rehearing covering 5 pages filed May 8, 1935 omitted from this print. It was denied, and nothing more by order of May 29, 1935.

[fol. 82] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—May 29, 1935

As neither of the judges who concurred in the decision of the court in the above numbered and entitled cause is of opinion that the petition for rehearing should be granted, it is ordered that the said petition be and the same hereby is denied.

[fol. 83] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,753. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 199. Frederick D. Dismuke, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 1, 1935. Term No. 199 O. T. 1935.

FILE COPY

FILED
JUL 1 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Frederick D. Dismuke, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered in the case of *United States of America* v. *Frederick D. Dismuke* on April 19, 1935, 76 F. (2d) 715, reversing the judgment of the District Court of the United States for the Middle District of Georgia.

I.

The Case.

Petitioner filed suit against the United States in the District Court of the United States for the Middle District of

Georgia, asking for a judgment for certain payments to which he claimed to be entitled under the provisions of the civil service retirement legislation enacted May 22, 1920 (Title 5 U. S. C., Section 691 *et seq.*), as amended by Section 8-A of the Act of June 16, 1933 (Title 5 U. S. C., Section 692d). A demurrer to the petition was overruled. The case was tried on a stipulation of facts (R. 14), with some additional evidence. The stipulated facts were adopted by the trial court as a part of its findings of fact (R. 9).

The material facts as shown by the stipulation are:

Petitioner served as a field deputy marshal for the Northern District of Georgia from December 16, 1895, to April 30, 1902, a period of 6 years, 4 months, and 14 days; as postmaster at Thomasville, Georgia, from February 7, 1902, to April 27, 1914, a period of 12 years, 2 months, and 20 days; and as a Federal Prohibition officer from September 10, 1921, to June 30, 1933, a period of 11 years, 9 months, and 20 days. The aggregate period of service amounts to 30 years, 4 months, and 17 days. If we exclude the time served as a field deputy marshal, petitioner's service aggregates 24 years and 4 days.

On June 30, 1933, petitioner was involuntarily separated from the service as a deputy prohibition administrator for reasons other than his misconduct and because of a reduction in force (R. 15).

On June 27, 1933, petitioner addressed a letter to the Director of Insurance, Veterans' Administration, Washington, D. C., stating that he had been a Government employee for over 31 years, and inquiring as to the amount of money he would be required to refund in order to secure the benefits of the Retirement Act (R. 15), and in reply was advised that he should deposit with the Treasurer of the United States an amount of $970.09. Petitioner in said letter was inquiring specifically about the retirement of

Government employees after 30 years of service (R. 15). This amount was duly deposited by petitioner with the Treasurer on October 26, 1933 (R. 16). Deductions were made from petitioner's salary under the retirement laws from February 29, 1928, to the end of his service. Petitioner has paid to the Government all of the deductions, refunds, and amounts required of him under the Civil Service Act, or the Annuity Act, in order to make him eligible for the annuity payments, having paid approximately $1,650.00 to the Government in order to be eligible for such payments (R. 17).

Petitioner filed claim with the Administrator of Veterans' Affairs for an annuity under the provisions of Section 8-A of the Act of June 16, 1933, and on or about December 26, 1933, was informed by the Director of Insurance that his claim had been rejected on the ground that he had not rendered 30 years of allowable service as required by that Act, and that his service as a field deputy marshal was excluded, because field deputies are considered as employees of the marshal and not of the United States (R. 17-18). This decision was affirmed on appeal by the Board of Veterans' Appeals (R. 18).

No disputed question of facts was involved either before the Administrative Agency or the District Court. The decision in both instances should have been controlled entirely by a question of law. The Director of Insurance rejected petitioner's claim "upon the ground that field deputy marshals are regarded as employees of the marshal and not of the United States" (R. 17-18). The Board of Veterans' Appeals stated the question it was called upon to decide, as follows: "May the time that this appellant served as a field deputy marshal be used in determining his eligibility to annuity?" (R. 18-19).

Petitioner's suit specifically attacked these administrative conclusions as being arbitrary, capricious, and clearly erroneous because they represent not findings of fact but erroneous conclusions of law (R. 3-4).

The District Court made careful findings of fact and conclusions of law (R. 9), and entered judgment against the United States, awarding petitioner an amount of $1,476.45, with a declaratory judgment that he is entitled to receive as an annuity monthly installments of $98.43 from October 1, 1934, until January 21, 1945, and monthly insfallments of $102.00 from January 21, 1945, until his death (R. 11).

The United States took an appeal to the Court of Appeals for the Fifth Circuit, specifying that the court erred:

(1) In entertaining jurisdiction of the suit.

(2) In reviewing the action of the Veterans' Administration and in awarding judgment against the United States.

(3) In awarding a declaratory judgment against the United States, and

(4) In holding that petitioner's service as a field deputy marshal may be included in calculating the 30-year period of service required by Section 8-A of the Act of June 16, 1933.

The Court of Appeals rendered its opinion and judgment on April 19, 1935, reversing the judgment of the lower court and remanding the cause with directions to dismiss the claim, the appellate court being of the opinion that the retirement legislation shows that Congress intended to provide only an administrative remedy and that the petitioner's claim, so far as its suability is concerned, was entirely withdrawn from court action. The Court of Appeals did not deal at all with the question of the correctness of the administrative decisions. In other words, so far as the

Court of Appeals' decision goes, petitioner may be clearly entitled to the annuity which he seeks, but is without remedy in the courts (R. 48-54).

II.

Questions Presented.

(1) Whether the District Court has jurisdiction of a suit against the United States under the Tucker Act for the recovery of civil service retirement payments where the claim for such payments has been properly prosecuted through all of the appellate agencies of the Veterans' Administration and has been finally rejected by such agencies, and where claimant has paid $1,650.00.

(2) Whether the District Court has jurisdiction of such a suit where the administrative agencies had before them for decision no disputed question of fact but only questions of law, and where such decision is clearly erroneous as a matter of law.

(3) Whether the District Court has jurisdiction to render in such a suit a declaratory judgment against the United States.

(4) Whether the time served as a field deputy marshal may be considered in computing the 30 years of service required by Section 8-A of the Act of June 16, 1933.

(5) Whether petitioner is denied the benefit of the due process of law to which he is entitled under the Fifth Amendment of the Constitution if he is not allowed at some stage of the proceeding, prescribed by the retirement legislation for the assertion and allowance of his claim, an opportunity for submitting to a judicial tribunal the question whether his claim is or is not allowable and enforceable.

III.

Assignments of Error.

(1) The Circuit Court of Appeals erred in deciding that the District Court had no jurisdiction of petitioner's suit.

(2) The Circuit Court of Appeals erred in deciding that there are matters, not of law, but of administrative discretion in applying the Civil Service Retirement Act, involved in determining the right of one claiming an annuity under the plan, which have not been resolved in petitioner's favor, and the resolution of which may not be controlled by court action.

(3) The Circuit Court of Appeals erred in not deciding that the District Court has jurisdiction to render a declaratory judgment against the United States.

(4) The Circuit Court of Appeals erred in not deciding that time served as a field deputy marshal may be considered in computing the 30 years of service required by Section 8-A of the Act of June 16, 1933.

IV.

Reasons Relied on for the Allowance of the Writ.

(1) The questions presented in this petition are of great importance not only to this petitioner but to every civil service employee of the United States. All such employees are entitled to know whether, in return for the deductions made from their basic salary and deposited in the Treasury each month, they have a justiciable right or whether their rights can be finally determined by an administrative agency and hence are a matter of administrative discretion.

(2) The Circuit Court of Appeals in this case has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit: Whether under the terms of the Tucker Act a civil service employee can maintain a suit for the payments to which he is entitled under the retirement legislation. This question should be settled by this Court because it vitally affects the successful operation of the plan for civil service retirement. Undoubtedly, civil service employees will have more confidence in the plan if they know that they are not precluded by an erroneous decision of the administrative officers.

(3) This question is not settled with convincing finality at this time because the decision in the Court of Appeals was by a divided court. It results, therefore, that this question has been presented to four judges, including the District Court, and two judges have decided it each way.

(4) The Circuit Court of Appeals has decided an important question of Federal law in a way probably untenable and in conflict with the weight of authority. It is generally held that a decision of an administrative tribunal is not clothed with finality where it rests, not upon issues of fact, but erroneous conclusions of law. Applicable decisions of this Court, among many, are:

United States v. *Babcock*, 250 U. S. 328;
United States v. *Williams*, 278 U. S. 255;
Silberschein v. *United States*, 266 U. S. 221;
Johnson v. *Towsley*, 80 U. S. 72;
American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94.

(5) The Federal question decided by the Court of Appeals in this case is decided probably in conflict with the applicable decisions of this Court cited in the preceding

paragraph. While the opinion of the Court of Appeals says that "there are matters, not of law, but of administrative discretion in applying the Act, involved in determining the right of one claiming an annuity under the plan which have not been resolved in plaintiff's favor, and the resolution of which may not be controlled by Court action," petitioner points out that the "matters" referred to are not referred to as disputed questions of fact but as "(matters) of administrative discretion in applying the Act." Petitioner does not see that there was any disputed question of fact involved before the administrative tribunal. In fact, there was no issue of fact before the District Court. The administrative agencies decided the question upon the written record of petitioner's employment and rejected his claim solely upon the ground that as a matter of law field deputy marshals are not employees of the United States but are employees of the marshal (R. 17-18). Administrative agencies do not have a discretion in *applying the law.* If they make a mistake, the courts can correct it.

In addition to the applicable decisions cited in the preceding paragraph, petitioner cites the case of *Crowell* v. *Benson,* 45 F. (2d) 66, and 285 U. S. 22, which holds that "Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer."

(6) The decision of the Circuit Court of Appeals denies to petitioner the due process of law to which he is entitled, because it permits the Government to retain the $1,650.00 which he has paid to them without offering him at any stage of the proceeding an opportunity to submit to a judicial tribunal the question whether his claim is or is not allowable and enforceable. The decision, therefore, is probably in conflict with the decision rendered by this Court in

Crowell v. *Benson*, 285 U. S. 22. As bearing upon the conflict between the Court of Appeals' decision in petitioner's case and the decision of this Court in the *Crowell* case, petitioner points out that the *Crowell* case came to the Supreme Court from the Court of Appeals for the Fifth Circuit and that the only judge who sat in the Court of Appeals in both the *Crowell* case and petitioner's case dissented in petitioner's case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7675, United States of America, Appellant, *v.* Frederick D. Dismuke, Appellee, and that the said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 199

FREDERICK D. DISMUKE,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Court of Appeals for the Fifth Circuit is reported in 76 F. (2d) 715. This opinion appears at page 48 of the Record. The District Court wrote no opinion but his conclusions of law are found at page 10 of the Record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is April 19, 1935 (R. 54). A petition for rehearing was filed on May 8, 1935 (R. 54), and was denied on May 29, 1935 (R. 55).

2. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Sec. 347, and in accordance with the Rules of the Supreme Court, particularly Rule 38. Cases, among others, relied upon as sustaining the jurisdiction of this Court are the following:

Cole v. *Ralph*, 252 U. S. 286;

Louisville Joint Stock Land Bank v. *Radford*, 294 U. S. —; 55 S. Ct. 854.

3. It is believed that paragraph 1 of Rule 12 of this Court has been sufficiently complied with by the statement of the grounds on which the jurisdiction of this Court is invoked, which statement is contained in the petition for the writ of certiorari and, for the sake of brevity, we are not making a restatement here.

III.

Statement of the Case.

It is believed that the statement of the case in the petition for the writ of certiorari is adequate, except that it does not reflect the facts as to the nature of the petitioner's duties, services and employment as a field deputy marshal, and, for the sake of brevity, we shall state here only those facts with reference to the status of petitioner as an employee of the United States.

As a field deputy marshal he devoted all of his time to the duties of his office, having no other occupation and no other income (R. 42). The duties which he performed were the same as those performed today by field deputies who are on a salary basis (R. 40). He was paid for his services out of funds advanced by the United States (R. 42). His remuneration was prescribed by acts of Congress and regulated by the Attorney-General and he was paid whether

or not the fees earned were collected from litigants (R. 41). He had to take a prescribed oath of office (R. 31). The Attorney-General issued instructions to him in minute detail as to the manner in which he should discharge his duties (R. 24). His office was created by an Act of Congress (28 U. S. C. A. 492). His appointment had to be approved by the Attorney-General (R. 42). The Government could discharge or remove him at will (28 U. S. C. A. 492) and, in like manner, the Government could reduce his pay (Revised Statutes 841).

IV.

Specification of Errors.

(1) The Circuit Court of Appeals erred in deciding that the District Court had no jurisdiction of petitioner's suit.

(2) The Circuit Court of Appeals erred in deciding that there are matters, not of law, but of administrative discretion in applying the Civil Service Retirement Act, involved in determining the right of one claiming an annuity under the plan which have not been resolved in petitioner's favor, and the resolution of which may not be controlled by court action.

(3) The Circuit Court of Appeals erred in not deciding that the District Court has jurisdiction to render a declaratory judgment against the United States.

(4) The Circuit Court of Appeals erred in not deciding that time served as a field deputy marshal may be considered in computing the 30 years of service required by Section 8-A of the Act of June 16, 1933.

V.

Summary of Argument.

A. The provisions of the Civil Service Retirement Legislation as amended by Section 8(a) of the Act of June 16, 1933, and the payment of $1,650.00 by petitioner to the Government in reliance upon such legislation gives rise to a contract between petitioner and the United States.

B. The District Court had jurisdiction of petitioner's contractual claim under the provisions of the Tucker Act.

C. The authorities relied upon by the Government do not sustain its contention that petitioner can not maintain this suit because of any quality of finality in the decisions of the administrative agencies.

D. Even if it should be decided that it was the intention of Congress to make the decision of the Commissioner of Pensions (succeeded now by the Veterans' Administration) final, nevertheless, the present case comes within the well settled rule that, notwithstanding such intended finality, such decisions are subject to judicial review where they are wholly without evidential support or wholly dependent upon a question of law.

E. A field deputy marshal is clearly an employee of the United States for civil service retirement purposes.

F. The District Court had jurisdiction to render a declaratory judgment against the United States.

VI.

ARGUMENT.

Point A.

Petitioner has a contract with the United States.

Section 8(a) of the Act of June 16, 1933 (Title 5, U. S. C. A. Section 692(d)) is set out in the Appendix. From a reading of this statute it appears that petitioner (assuming that he has the aggregate period of service of at least thirty years) "shall be entitled to an annuity," computed as provided in Section 694(a) of Title 5 U. S. C. It has been stipulated that the amounts awarded to petitioner by the judgment of the District Court represents a correct computation (R. 21).

The retirement legislation provides that there shall be deducted and withheld from the basic salary, pay or compensation of each employee a sum equal to 3½% of such employee's basic salary, pay or compensation (Title 5 U. S. C., Section 700(a)). It is obviously in return for these deductions and as their *quid pro quo* that Section 8(a) of the Act of June 16, 1933, says that such employees "shall be entitled to an annuity."

In other words, this is not a pension. It is not a gratuity. Petitioner seeks that which he has bought and for which he has paid. He has a contract.

Point B.

The District Court had jurisdiction under the Tucker Act.

The relevant portion of the Tucker Act is set out in the Appendix. From a reading of this Act it appears that the District Court has jurisdiction of all claims founded upon

any law of Congress or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would have redress against the United States either in a court of law, equity, or admiralty, if the United States were suable. War claims, claims for pensions, and claims for fees, salaries or compensation for official services of officers of the United States are excepted from the District Court's jurisdiction, but the Government does not contend that the petitioner's claim falls within any of these exceptions.

It was the purpose of the Tucker Act simply to remove the exemption of the United States from suit in cases founded upon any express or implied contracts with the United States. The language of the Tucker Act is broad and unambiguous. There is any number of decisions to the effect that a person having any kind of implied contract with the United States can file suit in the District Court. It may be well to refer to a few of these cases.

The act of firing guns from a fort across adjoining lands, which amounts to a taking, within the law of eminent domain, will imply a contract to pay for the land, although no adverse right was asserted, and whether the consequences of the acts were foreseen or not (*Portsmouth Harbor Land & Hotel Company* v. *United States*, 260 U. S. 327).

Where the owner of a vessel made a contract with a Government official for a rental of the same, which contract was unenforceable because it was not in writing as required by the Act of June 2, 1862, and where in reliance upon this parol contract the Government has used the vessel, the owner is entitled to recover the value of its use upon an implied contract for a *quantum meruit* (*Clark* v. *United States*, 95 U. S. 539).

The courts of the United States have jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of real property as a necessary result of the acts of its agents in improving navigation (*United States* v. *Lynah*, 188 U. S. 445).

In *Hiel v. United States* (D. C. N. Y., 273 Fed. 729) it was held that a suit for failure to transmit a cable message after the President had taken over the cables could be maintained against the United States. The court said:

> "It was urged at the bar that this result might expose the United States to serious loss and impede it in the discharge of its governmental functions. This is, of course, an irrelevant consideration, when the purpose of the act is clear; but here it is out of place in any event. Whatever be the justification in policy of the sovereign's immunity, the first consideration ought to be this: That in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act (this paragraph) meant to avoid such consequences."

An action against the United States by the lessee of certain offices to recover compensation for the taking of the offices by the United States for public use is within the jurisdiction of a Federal court (*National Laboratory & Supply Company* v. *United States*, 275 Fed. 218).

An action lies against the United States under the Tucker Act by a contractor for extra work done by him under the

direction of a Government agent (*Bowe* v. *United States*, (C. C. Ga. 890) 42 Fed. 761).

Where the United States in condemning land takes or destroys an easement over the same, appurtenant to lands not taken, there is an implied contract to pay for the same which will support an action in the District Court under the Tucker Act (*Tucker* v. *United States*, 283 Fed. 428).

The opinion of the Court of Appeals in petitioner's case cites four decisions of this Court for the proposition that the District Court, when it sits as a Court of Claims under the Tucker Act, sits only to hear claims for actual damages on money demands. The cases cited announce the principle that the Court of Claims, or the District Court under the Tucker Act, will not award nominal damages. Petitioner, of course, is not seeking nominal damages. He has, what is to him, a substantial claim. He has paid out to the Government for this claim $1,650.00 (R. 17).

The Circuit Court of Appeals is of the opinion that the retirement legislation shows an intent to provide a general plan to be exclusively administered by those the statutes place in charge of it, an intent to provide only an administrative remedy; that such claims are intended to be, so far as their suability as claims is concerned, entirely withdrawn from court action. We respectfully submit that this is a forced construction of the retirement legislation.

Let us examine the provisions of this legislation dealing with its administrative enforcement. Section 17 of the Act (5 U. S. C. 707(a)) authorizes the Commissioner of Pensions to do a number of things. He is "authorized and directed to perform or cause to be performed any and all acts, and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of Sections 691(a) to 708(a) of this Title into full force and effect." Then the statute provides that "an appeal to the

Secretary of the Interior shall lie from the final action or order of the Commissioner of Pensions. * * *"

The Government contends that this expression means that the decision of the Commissioner was to be conclusive save for the appeal to the Secretary of the Interior, but the statute does not say anything more than that when the Commissioner has finished with the claim and has taken his last or final action and signed his last or final order then, and not before, the appeal lies. Moreover, there is not a word in the statute to the effect that the decision on appeal shall be conclusive.

Stronger language than that contained in the Retirement Legislation was construed against the contention of the Government in the case of *Johnson v. Towsley,* 80 U. S. 72. The statute there under consideration declared that the general preemption law of 1841 shall "be so amended that appeals from the decision of the District Officers in cases of contest between different settlers for the right of preemption shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior." This Court said "in the use of the word 'final', we think nothing more was intended than to say that, with the single exception of an appeal to his superior, the Secretary of the Interior, his decision should exclude further inquiry *in that department"* (italics ours).

Petitioner need not rely upon the retirement legislation as giving him the consent of the Government to be sued. Petitioner already has that consent under the Tucker Act. He relies upon the retirement legislation, and his and the Government's conduct thereunder, as giving to him a contractual relationship with the Government, and he relies upon the retirement legislation as not affirmatively taking away the Government's consent to be sued.

There is nothing in the retirement legislation indicating that the Government was thereby withdrawing its consent to be sued upon express or implied contracts. Certainly, we are not going to infer or imply such a withdrawal. In the recent case of *Lynch* v. *United States*, 292 U. S. 571, this Court said that it is "not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding policies if it had realized that they had contractual rights." We think that, similarly, it is not to be assumed that Congress, after giving an unlimited consent to be sued on *express or implied* contracts, and after, through the retirement legislation, setting up machinery for creating new contractual relationships, intended silently or inferentially to withdraw this consent.

Justice Brandeis, in the recent case of *Crowell* v. *Benson*, 285 U. S. 91, said:

> "Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer."

It was not necessary that the retirement legislation specifically re-confer jurisdiction upon the District Court. It is true that in some legislation, for instance, the War Risk Insurance Act, the statutes which provide for the making of the contract or the assuming of the obligation expressly state that a named court shall have jurisdiction of the controversy. When this is done, however, it is not because the claim would not be justiciable without such provision but because of the desire of Congress to limit the forum. The purpose of Section 1 of the War Risk Insurance Act (38 U. S. C. 445) was not to confer jurisdiction but to limit it. It confines jurisdiction to the District Court; whereas, if it had not mentioned the District Court by name,

jurisdiction would have vested concurrently in the District Court and the Court of Claims (*United States* v. *Pfitsch*, 256 U. S. 547). This section of the War Risk Insurance Act also limited the jurisdiction of the lower court by requiring the existence of a disagreement as a condition precedent to the filing of the suit.

> "When the United States went into the insurance business, issued policies in familiar form, and provided that, in case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."
>
> *Standard Oil Company* v. *United States*, 267 U. S. 76, 79.

POINT C.

The Government's authorities distinguished.

In the lower courts the Government relied upon a number of cases for its contention that the language of the retirement legislation makes the decision of the administrative agency final. None of these cases, however, go to the point involved in this case and all of them are distinguishable.

In the case of *United States* v. *Babcock*, 250 U. S. 328, the statute said: "That any claim which shall be presented and acted on under authority of this Act shall be held as finally determined, and shall never thereafter be reopened or considered". The Supreme Court said "these words express clearly the intention to confer upon the Treasury Department exclusive jurisdiction and to make its decision final".

In the case of *United States* v. *Williams*, 278 U. S. 255, the statute provided: "The decisions of the Secretary of War, the Secretary of the Navy and the Director, on all matters within their respective jurisdiction under the provisions of this Act (except the duties vested in them by Title 7), shall be final and conclusive".

It should be pointed out here that the *Babcock* case and the *Williams* case dealt, not with contractual obligations against the Government, but with gratuities or bounties. In the *Babcock* case the claimant lost some property in the war. There was no duty or obligation on the Government to pay him for it apart from the statute which the Supreme Court was construing. In other words, Congress was bestowing a bounty, and, under such circumstances, could appropriately say that the decision of the Treasury Department would be final. In the *Williams* case the suit was to recover the amount of an adjusted service certificate. Of course, Congress in bestowing an army bonus could say that the decisions of the Secretary of War et al. should be final and conclusive.

In the case of *Silberschein* v. *United States,* 266 U. S. 221, the object of the suit was to recover compensation. The comment as to the *Williams* case is appropriate here.

The case of *Williamsport Wire Rope Company* v. *United States,* 277 U. S. 551, deals with a special privilege claimed by the taxpayer in the form of a special assessment. The Act itself stated that the taxpayer would not be entitled to a special assessment unless the Commissioner had resolved certain matters in the taxpayer's favor and the preliminary decisions by the Commissioner were clearly discretionary.

In the case of *United States* v. *Atchison, Topeka & Santa Fe Railway Company,* 249 U. S. 451, the railway company sued for increased compensation, actually a bonus, for carrying the mails under a statute which merely "authorized" the Postmaster-General to increase the carrier's compensation. The two fatal objections to the railway company's suit were the discretion vested in the Postmaster-General and the gratuitous character of the bonus.

In the case of *Work* v. *Rives,* 267 U. S. 175, the relevant statute treats of a gratuity under the act passed "to re-

lieve'' certain people. The statute with propriety declared the decision of the Secretary ''conclusive and final''.

In the lower courts the Government did not cite a single case denying the jurisdiction of the court where the suit was based upon an actual contract with the Government supported by an actual consideration. Of course, there is any number of cases holding that a person can not sue for a bonus or any other type of bounty or gratuity.

Petitioner concedes, as was decided by this Court in the *Lynch* case, that the Government can by appropriate legislation withdraw its consent to be sued upon its contracts, but petitioner insists, upon the authority of the *Lynch* case, that such legislation, in order to be effective, must clearly and unequivocally express such legislative intent. It is not to be assumed that the Government will accept its subject's money, the subject thinking that he is paying for a justiciable right, and ''subject the individual to the uncontrolled action of a public administrative officer''. The quotation is from the language of Justice Brandeis in the *Crowell* case.

The Circuit Court of Appeals was apparently influenced by the principle stated in the *Babcock* case as follows: ''That where a statute creates a right and provides a special remedy, that remedy is exclusive.'' If so, the Court of Appeals must have overlooked the fact that in the *Babcock* case the statute did actually *create* the right which did not exist prior to, or independent of, the statute. It has already been pointed out that Babcock lost some property during the war. There was no obligation resting on the Government to pay for this property. The statute involved created in Babcock a limited right; namely, to present a claim to the accounting officers of the Treasury with the distinct understanding ''that any claim which shall be presented and acted on under authority of this Act shall be

held as finally determined and shall never thereafter be reopened or considered''.

Of course, in all of the other cases of bonuses, bounties, gratuities and special favors relied upon by the Government, the same distinction is apparent, and the statute which *creates* such a right, or privilege, can circumscribe it with limitations.

The principle above quoted from the *Babcock* case comes down from or through the early case of *Stafford* v. *Ingersol,* 3 Hill 38 (N. Y.), which states it as follows:

> "So where a statute creates a right *which did not exist before,* and prescribes the remedy for a violation of it, that remedy must be pursued.''

The slightly later case of *Dudley* v. *Mayhew,* 3 N. Y. Court of Appeals Reports 15, states it thus:

> "had there been preexisting remedies in favor of inventors independently of those resulting from congressional legislation, this Act would not have taken them away. Nothing short of an express *exclusion* or of *utter incompatibility* between the preexisting and the new remedies would have done that''. (Italics ours.)

Thus, the doctrine relied upon by the Government has been traced back to or near its source and is found to be perfectly consistent with petitioner's contention and perfectly consistent with the Supreme Court's recent pronouncement in the *Lynch* case, to the effect that it will not be assumed that Congress intended to take away vested rights; and in the *Crowell* case, to the effect that it will not be presumed that Congress intended to subject the individual to the uncontrolled action of a public administrative officer. There is no "express exclusion'' or "utter incompatibility'' between petitioner's remedy under the Tucker

Act and the preliminary administrative procedure provided in the retirement legislation.

POINT D.

The decision of an administrative agency is always subject to judicial review if without evidential support or wholly dependent upon a question of law.

It appears from the pleadings and the agreed statement of facts in this case that no disputed question of fact was involved, but only a question of law.

Petitioner believes it clear that the Court of Appeals in concluding that there are matters not of law but of administrative discretion in applying the Act which have not been resolved in plaintiff's favor, and the resolution of which may not be controlled by court action, overlooked the decision of H. L. McCoy, Director of Insurance (R. 17-18), and the decision of the Board of Veterans Appeals (R. 18), and the stipulation of facts (R. 14). McCoy's decision shows very clearly that petitioner's claim was rejected on one ground; namely, his erroneous conclusion that, as a matter of law, field deputy marshals are not employees of the United States. The decision of the Board of Veterans Appeals relates to no other question. The stipulation expressly concedes that petitioner is entitled to recover if, under the admitted facts, he is an employee of the United States. Certainly, the Government would not have so stipulated if such issues were not resolved in petitioner's favor.

Two recent Law Review articles offer a clear analysis of the leading cases on this point and assert that wherever vested rights are involved, as distinguished from gratuities, and wherever the decisions of the administrative agencies are based, not upon an issue of fact, but upon a question of

law, such decision is always subject to review in the courts. These articles are listed:

Administrative Finality, 29 Michigan Law Review, page 839;

Judicial Review of Administrative Action by the Federal Supreme Court, 35 Harvard Law Review, 127.

This principle is recognized in the following cases:

United States v. *Babcock,* 250 U. S. 328;
United States v. *Williams,* 278 U. S. 255;
Lindsay v. *Hawes,* 67 U. S. 554;
Minnesota v. *Batchelder,* 1 Wall. 109-116;
Johnson v. *Towsley,* 80 U. S. 72;
American School of Magnetic Healing v. *McAnnulty,* 187 U. S. 94;
Moore v. *Robins,* 96 U. S. 530;
Marquez v. *Frisbie,* 101 U. S. 473;
Medbury v. *United States,* 173 U. S. 492;
United States v. *Laughlin,* 249 U. S. 442;
McLean v. *United States,* 226 U. S. 374;
The Judicial Review of Executive Acts, 23 Mich. Law Review, 588-599.

POINT E.

A field deputy marshal is an employee of the United States for Civil Service Retirement purposes.

The District Court made findings of fact in part as follows:

As a field deputy marshal, petitioner devoted all of his time to the duties of his office, having no other occupation and no other income (R. 9);

The duties which he performed were the same as those performed today by field deputies who are on a salary basis (R. 9-10);

Petitioner was paid for his services out of funds advanced by the United States (R. 10);

Petitioner's remuneration was prescribed by Acts of Congress and regulated by the Attorney-General and he was paid whether the fees earned were collected from litigants or not (R. 10);

The Government required that the deputy take a prescribed oath of office (R. 10);

The Attorney-General issued instructions to the deputy as to the manner in which he should discharge his duties (R. 10).

The District Court reached the following conclusions of law, among others. Petitioner, as a field deputy marshal, "was performing services for and was working for the Government of the United States" (R. 10). "The purpose and intention of Congress in enacting the statutes relating to the retirement of civil service employees was to provide an annuity for those who had been regularly engaged in working for the Government for the prescribed periods" (R. 11). "Petitioner, as a field deputy marshal, was an employee of the United States within the meaning of Section 8(a) of the Act of June 16, 1933, and the time which he served as a field deputy marshal can be used in determining his eligibility to annuity" (R. 11).

The office of field deputy marshal was created by an Act of Congress (28 U. S. C. A. 492). The Government expressly authorized marshals to appoint deputies (28 U. S. C. A. 492). The marshal was required, immediately after making such appointment, to report the same to the Attorney-General, who could "at any time cancel any such appointment as the public interest may require" (28 U. S. C. A. 492) (R. 27). The appointment of the field deputy marshal had to be approved by the Attorney-General (R. 42). The deputy was required to take the same oath of

office prescribed for the marshal (28 U. S. C. A. 494) (R. 14). No credit would be allowed to a marshal from public funds paid to a deputy who was not regularly appointed and who had not taken the prescribed oath (R. 31).

The deputy was not paid by the marshal out of the latter's money but was paid out of money advanced by the Government (R. 40, 41), "just like witnesses were" (R. 42). Prior to 1896 this money was deposited by the Government in a local bank and the first that the marshal knew about it after making his requisition was the receipt by him of a copy of a deposit slip (R. 41). After 1896 the marshal received a notice from Washington that these public funds were deposited to his credit in the Treasury (R. 41). Ever since the passage of the Act of May 28, 1896, field deputy marshals have been and are paid by the check of the marshal drawn on the Treasurer of the United States (R. 21).

Prior to the Act of May 28, 1896, both the marshal and the deputy were on a fee basis. Section 841 of the Revised Statutes provides compensation for the marshal "and a proper allowance for his deputies," and says: "The allowance to any deputy shall in no case exceed three-fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the Attorney-General whenever the returns show such rate to be unreasonable." It will be observed, therefore, that the statutes do not name a particular fee and say that the deputy marshal would be entitled to it. On the contrary, the statute named particular fees and said that the marshal would be entitled to it and provided further that the marshal should make a proper allowance for his deputies, meaning that the marshal and his deputies should agree upon a certain proportion of the fees earned by the deputy, the amount so agreed upon to be paid to the deputy. The

Government, through Congress, provided, however, that deputies in no case should get more than three-fourths of the amount of the fees prescribed for the services they rendered and the Attorney General retained the power to reduce that maximum amount.

In 1896 the marshals were placed on a salary and the deputies thereafter were to receive three-fourths of the gross fees formerly payable to the marshal, but this amount was not to exceed $1,500.00 per year, except that the Attorney-General could raise the maximum to $2,500.00 when, in his judgment, justice required it (28 U. S. C. A. 583) (R. 31, 35, 40). Thus the maximum and minimum of the deputies' income have always been controlled by the Government, although within certain limits prescribed by the Government, the marshal could agree with the deputy as to the proportion of the statutory fees he should receive (R. 27).

The Government, through the Attorney-General, had to approve the deputy's appointment (R. 42) and the Government, through the Attorney-General, could discharge or remove the deputy at will (28 U. S. C. A. 492) (R. 42); and, in like manner, the Government could reduce the deputy's pay (Revised Statutes 841). Moreover, the Government prescribed in minute detail by legislation and by instructions from the Attorney-General exactly what duties were to be performed by the deputy and in what manner he was to perform them (R. 24-39). The deputy was, in fact, paid by the Government. One paragraph of instructions from the Attorney-General to subordinate employees is as follows:

> "The compensation of a field deputy marshal for all his services, in cases between individuals as well as in cases to which the United States are a party, is paid by the United States, and is governed entirely by the statutes fixing the fees of such officers without relation

to the fees which may actually be paid by a private litigant for the services rendered by the deputy and which are covered into the Treasury." (R. 35.)

Another paragraph of the Attorney-General's instructions is as follows:

"When an office deputy or a field deputy is removed or dismissed because of official misconduct he must not again be employed in any capacity wherein his compensation is to be paid by the United States, unless specific authority has first been obtained from the Attorney-General." (R. 32.)

In the case of *Dudley* v. *James*, 83 Fed. 345, at page 348, the court, after quoting Sections 10 and 11 of the Act of May 28, 1896, used this language:

"It will be observed that the United States, both in office and field deputies, pay their compensation. As to office deputies, the compensation is by salary; as to field deputies by three-fourths of the gross fees which they may have earned. These fees are not in the name of the deputy, but go to the marshal, who, we assume, collects them and pays them into the Treasury; and the field deputies are paid out of the Treasury three-fourths of their gross fees."

The law provides the amount of compensation for a marshal or deputy for each particular service, such as making an arrest, serving a process, etc. The voucher which the deputy marshal made out showing the fees he had earned called for the amounts so fixed by law and the deputy marshal, in his account against the United States, was paid those fees whether or not the court taxed the costs against the defendant when he was convicted and whether or not those fees and costs were ever collected from the party litigant or from the defendant in the criminal case, against whom they were taxed (R. 41, 35).

It can hardly be doubted that a deputy marshal of today is an employee of the United States, and yet the only difference between his employment now and his employment at the time of petitioner's service as a deputy is that since 1904 or 1905 he has been paid a salary (R. 41).

Certainly the manner of payment, whether by salary or by fees, does not determine whether he is an employee. In the case of *Employers Indemnity Co. of Philadelphia* v. *Kelly Coal Company,* 149 Ky. 712, 149 S. W. 992; 41 L. R. A. New Series 963, 966, the court uses this language:

> "In 26 Cyc. 971, it is said: 'Whether or not the relation of master and servant exists in a given case is a question of fact, or of mixed law and fact, and is to be proved as any other like question. Generally speaking, any evidence tending to prove or disprove the relationship is admissible, its weight and sufficiency being left to the jury under the instructions of the court.'"
>
> "Speaking generally, the relation may be said to exist whenever the employer retains the right to direct not only what shall be done, but how it shall be done. *Robinson* v. *Webb,* 11 Bush. 464; *Central Coal & I. Co.* v. *Grider,* 115 Ky. 755, 65 L. R. A. 455, 74 S. W. 1058; *Jahn* v. *Wm. H. McKnight & Co.,* 117 Ky. 661, 78 S. W. 862. The significant element in the relation of an employee and his employer is personal service. In Wood on Master and Servant, § 317, it is said: 'The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct.' In other words, an 'employee' is one who works for and under the control of his employer. The mode of payment is a circumstance in solving the question whether the relation of master and servant exists, but it is not decisive of that question."

It seems indisputable that the deputy marshal is a Government officer. Mr. Justice Brown, in his concurring opinion in the case of *United States* v. *Andrew J. Matthews,* 173 U. S. 381, says that he thinks a deputy marshal is "beyond all peradventure an officer of the United States". The case of *Throop* v. *Langdon,* 40 Mich. 673, quoted in *State* v. *Johnson,* 123 Mo. 43, 27 S. W. 399, 401, says: "The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public officer for misfeasance or nonfeasance in office, usually, though not necessarily, in the tenure of his position."

A statute in the State of North Carolina authorized a forest warden to summon any male resident to assist him in controlling fires. The warden summoned Moore, who was injured while aiding in fighting a fire. He filed a claim for compensation and the question arose whether he was engaged in the employment of the State. The court said:

> "If the fire warden had himself been injured while performing his duties, his right to compensation would hardly be questioned. Was not the plaintiff equally engaged in the employment of the State? He and the warden were engaged in the same service—the extinguishment of the fire. The fact that he was serving the State by the command or appointment of the warden does not change the nature of the service; he was acting in the capacity of a temporary warden by authority and, indeed, by the mandate of the law. 18 R. C. L. 577."
>
> *Moore* v. *State,* 200 N. C. 300; 156 S. E. 806, 808.

> "The context and the connection in which it [the word employee] is used must largely determine whether in a particular case the term includes a certain person."
>
> 20 C. J. 1242.

Section 5467 of the Revised Statute makes it a crime for "any person employed in any department of the postal service" to embezzle any letter, etc. In the case of *United States* v. *Hanna*, 4 New Mexico 644, 17 Pacific 79, it was held "That a stage driver employed by the stage company, which had a contract for carrying the mails, and who was sworn as a mail carrier, is an employee of the postal service, within the meaning of this section, though he was hired and paid by the stage company and received no compensation from the government". That, of course, was a criminal case and certainly the statute in a criminal case is construed more strictly than in a case like the present.

> "An employee of defendant railway company, having charge of its pumping station and water tank, informed the superintendent that he had to leave on business, and would leave his 14-year-old son in charge, and received the superintendent's permission to do so. *Held*, that the son was an 'employee' of the company."
> *Yazoo & M. V. R. Co.* v. *Slaughter*, 92 Miss. 289, 45 Southern 873.

> "The rule is well settled that a person who is procured by an employee to act as his substitute or to assist him in his duties, the employer assenting to the arrangement, occupies the position of an employee, and that the duty owed him by the employer is the same as that owed to other employees. And it does not make any difference that the substitute or assistant is promised no compensation for his services."
> 18 R. C. L. 577, sec. 83.

The Government argues that the service of a field deputy marshal, who later comes under the Civil Service Act, is not to be counted under the retirement legislation because of Section 693 (d), Title 5, U. S. C. A., which contains the provision "that these groups shall include only those employees whose tenure of employment is not intermittent nor

of uncertain duration". Petitioner, as a deputy marshal, "served continuously" from the date he took his oath of office on December 16, 1895, until April 30, 1902, a period of six years, four months and fourteen days (R. 14-15). During this time he devoted all of his time to the duties of the office, having no other income or occupation (R. 42). There was no intermission between the cessation of his service as a deputy marshal and the beginning of his service as a postmaster at Thomasville, Georgia. In fact, the Government's records show an overlapping of these two periods of service, which is probably an error (R. 22).

It may be pointed out that in the event of the death of a marshal the deputy marshal has to carry on in the name of the deceased until another marshal is appointed. (28 U. S. C. A. 506.) It could hardly be said that a deputy would be merely an employee of the marshal during such period.

It is significant, also that the instructions of the Attorney-General to the marshals cover the contingency of an incoming marshal's being called upon to make payments "on account of services and expenses of his predecessor's deputies" (R. 37). If a deputy is merely a personal employee of a marshal an incoming marshal would hardly be expected to pay his predecessor's deputies.

Two cases very much in point are *United States* v. *Fitzpatrick,* 13 Wall. 568, 576, and *United States* v. *Charles H. Manning,* 13 Wall. 578. It is decided in the *Fitzpatrick* case that it is not necessary before a person can be an employee of the United States that he have a commission or warrant of appointment or that he draw a salary. In the *Manning* case the question presented was whether certain guards who were appointed to assist the warden of the jails of the District of Columbia were employees of the Government. The appointment of these guards was not authorized by any statute, nor was their compensation prescribed by any

appropriation. They were selected and appointed by the warden under the authority of the head of the Department of the Interior. It was held that they were employees of the Government, for the reason that although the charge for their services was required to be approved by the warden, and included by him in his report, the report was nevertheless subject to revision by the Secretary of the Interior, who had the power to fix the amount of the guard's compensation.

Government's Cases Distinguished.

The Government cited four cases on this question:

Douglas v. *Wallace,* 161 U. S. 346;
Powell v. *United States,* 60 Fed. 687;
United States v. *McDonald,* 72 Fed. 898, 900; and
Wintermente v. *Smith,* 30 Fed. Cas. 17,897.

None of these cases deal with the question here involved. Each of them deals with the suability of the Government at the instance of a deputy marshal to recover his fees and these cases decide that the Government is not suable in such a case. As was pointed out in the *Powell* case, the statutes do not contain a promise direct to the deputy marshal covering his compensation. The statutes provide fees for the marshal "and a proper allowance to his deputies" (Revised Statutes 841). The *Powell* case points out further, "in contemplation of the law there can be no severance or division of interest in the fees between the marshal and his deputies for which each can severally make claim". In other words, in those days the Tucker Act had not been amended so as to exclude from claims on which the Government could be sued the claims of an officer for fees, salary, or compensation for official services. The courts in the cases relied upon by the Government merely refuse

to hold that the deputy marshal could sue the Government directly for his compensation in the absence of an express undertaking on the part of the Government to pay the deputy. As was pointed out in the *Powell* case, such holding would constitute a severance of the marshal's claim and subject the Government to numerous suits.

In the *McDonald* case the suit was filed by a lawyer who had been appointed by a District Attorney ostensibly as a clerk but to assist him in the duties of his office. The Attorney-General had authorized such appointment "on condition that the appointee should look solely to the District Attorney for his compensation which was to be paid out of the emoluments of the office". It is understandable that such an employee can not repudiate the terms of his employment.

The *Douglas* case and the *Wintermente* case are to the same effect.

The Government argues that a deputy is not an employee of the United States because he can not maintain a suit against the Government. The logical conclusion of this argument is a contention that a deputy marshal or even a marshal is not an employee of the Government today because the Tucker Act, as it reads at present, excludes from the jurisdiction of the District Court "cases brought to recover fees, salary, or compensation for official services of officers of the United States". Certainly, the Government would not pursue its contention to that length.

Point F.

The District Court had jurisdiction to render a declaratory judgment against the United States.

The Tucker Act conferred upon the District Court jurisdiction concurrent with the Court of Claims of all claims founded upon any contract, express or implied, with the

Government or for damages liquidated or unliquidated in cases not sounding in tort "in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, etc. * * *." This section of the statute concludes by providing that all suits brought and tried under it shall be tried by the court without a jury. Other sections of the Act (28 U. S. C. A. 761 through 765) provide a particular procedure for suits against the Government. Section 764 makes it the duty of the court to cause a written opinion to be filed, setting forth findings of facts and conclusions of law and to render judgment thereon. This section provides, further, that "if the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts." It would seem that Congress intended these law suits to be governed by the same rules of procedure and be in all respects similar to other law suits except as the manner of conducting this type of litigation is changed by statute. It would seem, further, that when Congress on June 14, 1934, adopted the Declaratory Judgments Act which, in itself relates to matters of practice and procedure, they intended that it would apply to all cases in the courts of the United States. For the statement that the Declaratory Judgment Act relates only to matters of practice and procedure, petitioner cites *Nashville C. & St. L. Railway Co.* v. *Wallace,* 288 U. S. 249, and Borchard on Declaratory Judgments, page 299.

There is no reason apparent why a declaratory judgment is not proper against the United States. The truth is, as has been pointed out by writers on the subject, that every judgment against the United States is only declaratory in its nature. It is not coercive. Nothing can be levied upon. It simply fixes or declares rights.

The Government relies upon *United States* v. *Jones*, 131 U. S. 1, for the proposition that there is no jurisdiction under the Tucker Act to award judgments against the United States except for "money found due." The *Jones* case used that language but the Court was not referring to whether or not the money was actually due at the date of the judgment. In that case the plaintiff was seeking by specific performance to compel the Government to issue and deliver a patent for land. The Court said that the language of Congress "confines the subject matter to cases in which the petitioner sets up a moneyed demand as due from the Government."

Although the Circuit Court of Appeals did not deal with Points E and F, in this brief, we have discussed them since, as we understand it, the Supreme Court can, under the authority of its decision in the case of *Cole* v. *Ralph*, 252 U. S. 286, proceed to a complete decision and not confine itself to those questions considered by the lower court.

Conclusion.

Therefore, we respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers in order that all of the Civil Service employees of the United States may know whether they have a justiciable right in return for the money which they are paying into the Treasury each month, and that, to such an end, a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

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APPENDIX.

Section 8 (a) of the Act of June 16, 1933, 48 Stat. 283, 305, U. S. C., Title 5, Section 692 (d), is as follows:

692d. *Involuntary Separation.*—

(a) Whenever at any time hereafter prior to July 1, 1935, any employee of the United States or the District of Columbia to whom this chapter applies, who has an aggregate period of service of at least thirty years computed as prescribed in section 695a of this chapter is involuntarily separated from the service for reasons other than his misconduct, such employee shall be entitled to an annuity computed as provided in section 694a of this chapter payable from the civil service retirement and disability fund less a sum equal to 3½ per centum of such annuity: Provided That when an annuitant hereunder attains the age which would have been the retirement age prescribed for automatic separation from the service applicable to such annuitant had he continued in the service to such retirement age, such deduction from the annuity shall cease. If and when any such annuitant shall be reemployed in the service of the District of Columbia or the United States (including any corporation the majority stock of which is owned by the United States), the right to the annuity provided by this section shall cease and the subsequent annuity rights of such person shall be determined in accordance with the applicable provisions of retirement law existing at the time of the subsequent separation of such person from the service. (June 16, 1933, c. 101, 8 (a) 48 Stat. 305.)

Tucker Act.

The relevant portion of the Tucker Act is as follows:

The District Courts shall have original jurisdiction, as follows: Suits against United States—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United

States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, * * *." 28 U. S. C. A. 41 (20).

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER

J. J. McCREARY,
Counsel for Petitioner.

J. DOUGLAS CARLISLE,
W. A. BOOTLE,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,

Petitioner

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF FREDERICK D. DISMUKE.

In replying to the Government's brief, petitioner wishes to emphasize his contentions that:

First. The annuity which he seeks is not a pension;

Second. The District Court has jurisdiction under the Tucker Act because the suit is based upon a contract, either express or "implied in fact," as distinguished from quasi contracts or contracts "implied in law";

Third. The District Court has jurisdiction under the Tucker Act because the suit asserts a claim founded upon a law of Congress;

Fourth. Petitioner's suit is not "brought to recover fees, salary, or compensation for official services";

Fifth. Congress never intended that the decision of the Bureau of Pensions, later the Veterans Administration, later the U. S. Civil Service Commission, should be final, especially where, as in this case, such decision is made on undisputed facts;

Sixth. Petitioner is not limited to a proceeding for mandamus;

Seventh. The Court properly rendered a declaratory judgment;

Eighth. On the merits of the case, petitioner as a field deputy marshal was an employee of the United States.

ARGUMENT.

The Annuity Which Petitioner Seeks is Not a Pension.

The relevency of this particular inquiry lies in the fact that the Tucker Act contains this provision:

> "Nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the Civil War, and commonly known as 'war claims', or to hear and determine other claims which had been rejected or reported on adversely prior to the 3rd of March, 1887, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; * * *."

In petitioner's brief in support of the petition for writ of certiorari, he stated, at page 16, that war claims, claims for pensions and claims for fees, salaries or compensation for official services of officers of the United States are excepted from the district court's jurisdiction but that the Government did not contend that the petitioner's claim falls within any of these exceptions. This statement, of course,

had reference to the Government's position in the District Court and in the Court of Appeals. The Government in this Court is contending that the annuity provided for in the Civil Service Retirement Legislation is a pension. Hence, the necessity for this reply brief.

In determining the meaning of a word used in a statute, the first reference should be to the statute itself. In the Civil Service Retirement Legislation it seems that Congress studiously avoided the use of the word "pension." The word "pension" is nowhere in the legislation used as a synonym for "annuity." The administration of the Retirement Act was for a while entrusted to the Commissioner of Pensions and, naturally, there are repeated references in the Act to the Commissioner of Pensions but, except for such references, we think we are correct in saying that the word "pension" or "pensions" appears only twice in the entire Act as amended and codified in Title 5 of the United States Code. These two references are as follows:

> "—payment of all annuities, refunds, and allowances granted hereunder shall be made by checks drawn and issued by the disbursing clerk for the payment of pensions in such form and manner and with such safeguards as shall be prescribed by the Secretary of the Interior in accordance with the laws, rules and regulations governing accounting that may be found applicable to such payments (May 22, 1920 c. 195, Section 12, 41 Stat. 619, Title 5, U. S. C. Section 725);"
>
> "In the case of an employee who is eligible for and elects to receive a pension under any law, or compensation under the provisions of Chapter 11 of Title 38, the period of his or her military or naval service upon which such pension or compensation is based shall not be included for the purpose of assignment to classes defined in Sections 698 to 706 of this title, but nothing contained in Sections 691 to 693 and 697 to 731 of this title shall be so construed as to effect in

any manner his or her right to a pension, or to compensation under the provisions of chapter 11 of title 38, in addition to the annuity herein provided (May 22, 1920, c. 195 Section 3, 41 Stat. 615, Title 5 U. S. C. Section 707)."

The first quoted excerpt from the Act shows only that the Government designated one of its employees in particular, namely, the disbursing clerk for the payment of pensions, to draw the checks with which to pay these annuities. That is simply a matter of accounting. The second quoted excerpt from the Act shows clearly that Congress differentiated between pensions and annuities and stipulated that the same period of service should not be counted both for a pension and for an annuity.

We have not read all of the pension laws as embodied in a separate title of the United States Code, namely, Title 38, but as far as our reading of that title goes, we find that Congress always called a pension by its correct name and we do not find Congress referring to pensions as annuities, although it might have been proper to do so.

Now coming to that provision of the Tucker Act which is quoted above, we find that Congress excluded from the jurisdiction of the district courts "claims for pensions." We find too that such provision of the Tucker Act appears in the same part of the same sentence, and before the first semicolon of that sentence, which excludes from the jurisdiction of the courts "claims growing out of the Civil War, and commonly known as "war claims." The Tucker Act was passed on March 3, 1887, long before the Retirement Act which was passed on May 22, 1920. In 1887 neither the United States Government nor the Governments of the different states had made any progress in providing for the retirement of its employees upon annuities. Certainly the "pensions" referred to in the Tucker Act were pensions as they were known and understood at that time, and as

they were known and understood to the courts at that time.

This Court in 1857, in the case of *Walton* v. *Cotton*, 19 How. 355; 15 Law Ed. 658, in construing the Pension Acts of June 4, 1832, and July 4, 1836, said:

> "The pension is undoubtedly a bounty of the Government * * *"

and

> "Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered."

Again in the case of *U. S.* v. *Teller*, 107 U. S. 64, this Court said:

> "No pensioner has a vested right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute or recall, at its discretion. *Walton* v. *Cotton*, 19 How. 355."

No doubt these are the pensions or the types of pensions to which Congress referred in the Tucker Act.

> "A pension is a gratuity only where it is granted for services previously rendered, which at the time they were rendered gave rise to no legal obligation."
> *O'dea* v. *Cook*, 169 Pac. 366(1).

Nomenclature is not always scientific. As was said by the late Justice Holmes:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."
> *Towne* v. *Eisner*, 245 U. S. 418.

Courts frequently have referred to retirement annuities as pensions, although, at the same time, holding that con-

tractual rights, property rights, and vested rights exist with reference to such so-called pensions.

> "A provision for a pension to police officers and their beneficiaries * * * in a sense becomes part of the contract of employment itself."
>
> 43 C. J. Page 813, Section 1407.

> "Like other pension laws, pension acts applicable to members of the police force will be liberally construed. The purpose of such acts is doubtless to promote efficiency and encourage continuity of service, and therefore they should be construed in harmony with this purpose. Acts granting police pensions are prospective in their operation, and are applicable to members of the police force who subsequently become members; but they are applicable to members of the police force at the time the provisions become effective, although such a construction makes them in a sense retrospective, as imposing upon the municipality duties and responsibilities arising out of past transactions. Acts granting police pensions do not govern cases where retired members of the force have died prior to their enactment, but this rule does not apply to an amendment which expressly or impliedly extends its provisions to beneficiaries under a former statute."
>
> 43 C. J. Page 813, Section 1408.

A police pension fund applies to all those who are in service when the law takes effect, although they serve a very short time thereafter before becoming entitled to its benefits.

> "Such pensions generally are not considered donations or gratuities."
>
> *People* v. *Abbott*, 274 Ill. 380, 113 N. E. 696.

> "In this aspect of the case, if no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state. *Mead* v. *Inhabitants of*

Acton, 139 Mass. 341, 1 N. E. 413. But the relator continued in the service nine years after the law was enacted and thereby earned a right to his pension under that Act so long as it shall remain in force. The amendment of 1909 (increasing the amount to $50.00 per month) does not repeal the Act of 1895 so as to deprive the relator of his right to a pension, but, since he rendered the state no services subsequent to the enactment of that amendment, to increase his pension would violate Section 16, Article 3 of the Constitution. The fact that some firemen earned their pensions by serving a comparatively short time subsequent to 1895, whereas others were compelled to continue in the service for a greater length of time, does not make the legislation void. The constitutional limitations do not apply to such conditions."

State ex rel. Haberlan v. *Loue*, 89 Neb. 149; 131 N. W. 196.

We think the authorities above cited fully answer the Government's contention that this annuity is a pension in that the petitioner is given credit for services rendered prior to the date of the Retirement Act. Almost all retirement systems are in that particular retrospective in their operation. That does not make it a pension, however, nor does it eliminate the contractual element. (See *Retirement Board of Allegheny County* v. *McGovern*, 316 Pa. 161, 174 A. 401, 406.) The fact remains that after the effective date of the Retirement Act, petitioner came into the classified civil service at a time when the Government, through the retirement legislation, was saying to him: If you come into the classified civil service and continue to work for the Government, paying into the fund the amounts called for by the Retirement Act, you "shall be entitled," etc.

We think the authorities above cited also answer the Government's contention that $1650.00 paid by petitioner is insufficient to purchase an annuity of approximately $1200.00 per annum for a man of fifty-eight years of age.

Petitioner accepted the Government's offer, just as did the soldiers during the World War accept the Government's offer by contracting for War Risk Insurance under terms much more advantageous than they could have obtained from a private insurance company. The courts will not, in the absence of fraud or other special circumstances, inquire as to the adequacy of consideration. That, in substance, is what the Government is asking the Court to do. (See *Eyre* v. *Potter*, 15 How. 42, 60.)

The Government's brief argues that a claim for annuity "partakes of the nature of a pension" (page 8), is "in substantial part a pension" (page 8), "partakes more of the nature of a pension than a contract obligation" (page 16), and refers to "the pension element which exists in the claim" (page 18). It occurs to us that this argument does not get us anywhere. This annuity is either a pension or it is not a pension. The fact that it, in some respects, resembles a pension is not sufficient to exclude it from the jurisdiction of the District Court. We insist that it is not a pension because petitioner paid $1650.00 for it and because it is not granted entirely for past services, or even primarily for past services. The Retirement Act was primarily prospective in its operation and provided that all those who would thereafter do certain things and pay certain amounts would be entitled to the annuity. It only incidently provided that all those who in the future did certain things and paid certain amounts would be given credit, in computing the amount of the annuity, for services rendered prior to the passage of the Act.

We take it that there is no doubt about the fact that if A renders services voluntarily for B without expecting to be paid and later B says to A "I am giving you a promissory note for $100.00 in consideration of the services which you have heretofore rendered and in consideration of the services which you will hereafter render," the note is sup-

ported by a perfectly valid consideration, assuming that A continues to serve.

13 C. J. Page 362, Section 227.

> "Where an allowance is made out of hand, gratuitously, and purely for past services, by the Government, it is a pension, with the attributes of a pension; but where the employee contributes a part of his salary or wages with a sum from the state or county under a quasi contractual relationship with the municipality or state, creating a contributive reserve retirement system, the results are different. Retirement pay made therefrom is not a pension; the contributions by the Government from their very nature must be viewed in a different light."
>
> *Retirement Board of Allegheny County* v. *McGovern,* 316 Pa. 161, 174 A. 401, 405.

A foot note appended to the above quoted decision reads:

> The opinion of the Federal Supreme Court (*Lynch* v. *United States,* 54 S. Ct. 840, 78 L. Ed. 1434, decided June 4, 1934 (described the difference between War Risk Insurance and a pension; the former having the incidents of a contract (as retirement pay does here). The insurance fund is made up of contributions by the Government and the member, the Government paying the entire cost of administration. These engagements are held to be contracts."

II.

The District Court Has Jurisdiction Under the Tucker Act Because the Suit is Based Upon a Contract Either Express or "Implied in Fact" as Distinguished From Quasi Contracts or Contracts "Implied in Law"

We need not decide in this case whether petitioner's contract is an express contract or an implied contract. It is either an express contract or a contract implied in fact as

distinguished from one implied in law. The three types of contracts are defined in Black's Law Dictionary as follows:

> "An express contract is an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing."
>
> "An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter or reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding."
>
> "Implied contracts are sometimes subdivided into those 'implied in fact' and those 'implied in law', the former being covered by the definition just given, while the latter are obligations imposed upon a person by the law, not in pursuance of his intention and agreement, either expressed or implied, but even against his will and design, because the circumstances between the parties are such as to render it just that the one should have a right, and the other a corresponding liability, similar to those which would arise from a contract between them. This kind of obligation therefore rests on the principle that whatsoever it is certain a man ought to do that the law will suppose him to have promised to do. And hence it is said that, while the liability of a party to an express contract arises directly from the contract, it is just the reverse in the case of a contract 'implied in law', the contract there being implied or arising from the liability—but obligations of this kind are not properly contracts at all, and should not be so denominated. There can be no true contract without a mutual and concurrent intention of the parties. Such obligations are more properly described as 'quasi contracts'."

This is probably an express contract because its terms are all expressed in writing and are stated in distinct and explicit language.

It is a statutory contract. The Retirement Act constitutes the offer on the part of the Government; the rendering of services and the paying of money constitutes the acceptance on the part of petitioner.

> "The legislature, in effect, makes this offer to the employee; the state or municipality will contribute so much money to a fund and you will contribute to the same fund for a given time on the basis of service performed. Conditions or qualifications are added for the benefit of the fund and the employee. The right is given to the employee to cease payment and withdraw from the fund, recovering back his contributions, when his services end, under Section 324, Act of 1929 (16 PS, Section 324). It is difficult to understand where this relation lacks the elements of an executory contract if the employee or the state have directly or indirectly made any payments on account of it. (See *Lynch* v. *United States, supra*). The state and its agencies are as certainly bound by their contracts as are individuals."
>
> *Retirement Board of Allegheny County* v. *McGovern, supra.*

It is contented in the Government's brief that this is not a contract because there is lacking the element of mutual consent. This argument is fully answered by the following quotation from the case of *Retirement Board of Allegheny County* v. *McGovern, supra:*

> "The employees' contributions are as much wages or salary when deducted at the source as though they had been paid directly, and in Allegheny County they are paid directly. The legislation so recognizes this principle in that county and elsewhere when it permits the employee to withdraw under given circumstances from the association and take back his contribution as

salary. Both the funds the county or the state contributes are absolutely vested in the system that has been created by it except the right of withdrawal just discussed. To hold otherwise, for the reason that employee contributions are not wages when compulsorily deducted, would not only be unfair or unjust but would circumvent all known equities. Especially is this true when the interests of a retired employee in the reserves is denied after his salary has been made to contribute thereto for years, and he is beyond an age when his usefulness as a provider is intact. To take an amount or to require an amount to be paid from a salary is a deduction of part of the salary and not a reduction of salary. To take this earned salary and deny any vested right in it is against fair dealing."

We hardly see how the Government would be permitted to say that the element of mutual consent is lacking when it makes a deduction from the earned salary of the employee and is careful to preserve the earmarks of a contract or agreement. Section 9 of the Retirement Act, Title 5 U. S. C., Section 722, provides:

"Every employee coming within the provisions of Sections 691 to 693 and 697 to 731 of this title shall be deemed to consent and agree to the deductions from salary, pay, or compensation * * *."

In this connection it must be borne in mind that the amount deducted from the employee's salary was the property of the employee. In that regard, this case differs from the case of *Pennie* v. *Reis*, 132 U. S. 464, and the cases which follow it. Of such cases, the Supreme Court of Pennsylvania, in the case of the *Retirement Board of Allegheny County v. McGovern, supra*, said:

"Some states hold that the contributions of the employees are not salary inasmuch as the amount compulsorily contributed never reached them but was withheld by the state or municipality; and, therefore, a

member of a retirement or pension fund has no vested interest in such contributions, but the fund remains in the unrestricted and absolute control of the state or municipality which may seize and divert it entirely to any purpose deemed fit. This was held to be so even after the employee has qualified under a particular Act. If this is true, then the employee could not complain of the matter here involved. Such cases, however, involve statutes which do not give a right to the member to withdraw the amounts deducted from his salary because no part of the contributor's money is in the fund, but only public monies, and nearly all the cases involve changes by amendments to the laws, in what may be called 'actuarial' or business management features."

The Retirement Act specifically provides that if an employee in the civil service shall be transferred to an unclassified position, or if an employee under the civil service shall become separated from the service before becoming eligible for retirement on an annuity, "the total amount of deductions of salary, pay, or compensation with accrued interest computed at the rate of 4% per annum, compounded on June 30th of each fiscal year, shall, upon application, be returned to such employee." The Act also provides that if an "annuitant shall die without having received in annuities an amount equal to the total amount of the deductions from his or her salary, pay, or compensation, together with interest thereon at four per centum per annum compounded as herein provided up to the time of his or her death, the excess of the said accumulated deductions over the paid annuity payments shall be paid in one sum to his or her legal representatives upon the establishment of a valid claim therefor; and in case an employee shall die without having reached the retirement age or without having established a valid claim for annuity, the total amount of deductions with accrued interest as herein provided shall be paid to the legal representatives of such

employee." Title 5, U. S. C., Section 724. It will be seen, therefore, that the Act consistently recognizes the fact that the amounts deducted belong to the employee.

Moreover, we should bear in mind that it was apparently optional with petitioner whether he should remit to the Government the amount of $970.09 after his separation from the service in order to get the full benefit of the Retirement Legislation, the said amount representing deductions which would have been made from petitioner's salary after the passage of the Retirement Act in 1920 and prior to his becoming a civil service employee on March 1, 1928, had he been a civil service employee between those dates. The Act did not require that this deposit or payment be made. The language of the Act is:

> "Upon the transfer of any employee from an unclassified to a classified status, or upon the reinstatement of a former employee, credit for past service rendered subsequent to August 20, 1920, or for any part thereof, shall be granted only upon deposit with the Treasurer of the United States of the amount of such deductions with interest as provided in Sections 691 to 693 and 697 to 731 of this title, as would have been made for the periods of actual service, or part thereof, for which credit is to be given * * *. Failure to make such deposit shall not deprive the employee of credit for any past service rendered prior to May 22, 1920, and to which he or she would otherwise be entitled." (Title 5 U. S. C., Section 723.)

As stated on page 33 of the Government's brief, petitioner was permitted to make this deposit. He was not required to do so. The amount of this deposit is now in the possession of the Treasurer of the United States and petitioner holds receipt therefor (R. 16).

We fail to follow the reasoning in the Government's brief (page 14) to the effect that there is no obligation on the part of the United States in favor of the petitioner since

the Civil Service Retirement Act merely creates the fund out of which the annuity is to be paid. The civil service retirement and disability fund is not a barrier obstructing the legal relationship or the rights and duties existing between the Government and petitioner. This fund is not a corporation, partnership or person. It has no entity. It is merely a matter of bookkeeping. It is one of the Government's pockets in which it put the deductions withheld from petitioner's salary and the $970.09 which petitioner paid after the termination of his service. The fund did not make any promises to petitioner. Petitioner was not employed by the fund. The Act provides that the Secretary of the Treasury shall withhold the deductions

> "and said sums shall be transferred on the books of the Treasury Department to the credit of a special fund to be known as 'the civil service retirement and disability fund' and said fund is hereby appropriated for the payment of annuities, refunds, and allowances as provided in Sections 691 to 693 and 697 to 731 of this title." (Title 5 U. S. C., Section 719.)

It will be observed that as soon as, and as fast as, these sums are transferred on the books of the Treasury Department to this particular fund, they are simultaneously appropriated for the payment of these annuities. We do not agree that petitioner's judgment would have to be satisfied out of the ordinary revenues of the Government after the judgment is reported to Congress for appropriation. Under the Statute above quoted, an appropriation has already been made. If those in charge of the fund desire that an annuity certificate be issued before payment is made, there should be little difficulty in obtaining such certificate if the judgment which petitioner obtained in the District Court is permitted to stand. In a somewhat similar situation which was presented to this Court in the case of

Miguel v. *McCarl*, 291 U. S. 442, where the Comptroller General was in possession of a voucher which this Court decided should be paid, this Court said:

> "But it is not to be supposed that, upon having his attention called to our decision, the Comptroller General will care to retain possession of the voucher or that he will interfere in anyway with its payment."

On page 12 of the Government's brief three cases are cited for the proposition that it is only where the United States is directly obligated that a contract within the meaning of the Tucker Act exists. These cases on their facts are readily distinguishable from the instant case. The *Hijo* case involved the seizure of a Spanish vessel during the war. The Government claimed the right to seize the vessel and there was nothing to indicate that the Government expected the owner of the vessel to receive any compensation for its use. The *Bigby* case was a plain tort case where the plaintiff sought to recover damages from the Government for personal injuries resulting from the negligence of the operator of an elevator in a Government building. In the *Minnesota Mutual Investment* case, the Government had collected interest on money paid into court during litigation, such collection being made under a claim of right to the interest collected. In all of these cases it plainly appeared that the Government did not expect any of the complainants to receive remuneration from any source. In none of them was there the slightest basis for the implication of a contract.

On page 13 of the Government's brief four cases are cited for the proposition that the consent of the United States to be sued in contract, express or implied, is restricted to express contracts and contracts implied in fact as distinguished from quasi contracts or contracts implied in law. The cases amply support that proposition. In each of the

four cases it was clear that, at the time of the transaction involved, the Government never intended in fact to pay the respective plaintiffs. In the *Alabama* case, the State of Alabama asserted, and the United States denied, Alabama's power to tax the Government for the privilege of selling power at Muscle Shoals. In the *Merritt* case, the Government collected money from a contractor under a claim of right and did not collect it for the benefit of the plaintiff, a sub-contractor. In the *Baltimore & Ohio Railroad Company* case, the plaintiff sued to recover from the Government for the gratuitous construction of barracks. There was nothing to indicate that at the time the barracks were constructed the plaintiff expected remuneration or that the Government expected to pay. That case would have to rest entirely upon the theory of unjust enrichment, or the theory of quasi contracts. The *Sutton* case involved a contract for public improvements and was controlled by a section of the Revised Statutes which limited such contracts of the Government to amounts actually appropriated. At this point it is not amiss to point out again that the entire civil service retirement fund is already appropriated.

The case of *Dickey* v. *Jackson* (Iowa), 165 N. W. 387-389, holds that a pension fund "when provided as part of a scheme of employment (it) would seem to include some elements of a contractual character, and is doubtless intended to encourage faithfulness of service."

The Supreme Court of Florida, in the case of *State ex rel. Holton* v. *City of Tampa*, 159 So. 292, 293, recognizes that the right to a pension may become a vested one after it has entered into a contract of employment and says: "We think that in this case the right of Holton to a pension became a vested one by reason of his having fully performed all that he was required to do under the terms of his employment as a condition precedent to his having a pension allowed to him * * *." The same case speaks of a statu-

tory contract in these terms: "Surrender of an existing right to continue to hold an office or employment for a specified term is a sufficient consideration to support a statutory contract by public authorities or by the state itself, providing that the surrender of the office or employment before the normal expiration of the term of office or employment shall entitle the one so surrendering his existing legal rights to receive thereafter for life, or for a term of years, a retirement pay in the form of a pension payment deemed sufficient to compensate the officer or employee for the loss of the rights he surrenders in consideration thereof."

In the case of *Pennie* v. *Reis*, 132 U. S. 464, this Court indicated very strongly that where a person claiming the benefit of a retirement fund has continued in service until all of the contingencies happened so as to entitle him to the benefits of the fund, he then has a vested right to such payment. The Court said:

> "Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority."

Speaking of the *Pennie* case and also of the case of *Clarke* v. *Reis*, 87 Cal. 543, 25 P. 759, the California District Court of Appeals, in the case of *Klench* v. *Board of Pension Fund Com'rs of City of Stockton*, 249 P. 46, 50, said:

> "these cases, however, at least inferentially support the view that, when the event or the contingency happens upon which the officer is entitled to receive the money provided for pensioning him as a retired officer, then, in that case, the right to be paid such money is a vested right."

In a note in 54 *American Law Reports*, page 945, numerous cases are cited for this statement: "It is, however, conceded that where any particular payment under a pension has become due, the pensioner has a vested right therein." Among the cases cited is the *Pennie* case.

In the recent volume of the *American Law Reports*, Volume 98 at page 507, appears this statement:

> "It is said in the earlier annotation that, where any particular payment under a pension has become due, it is generally conceded that the pensioner has a vested right therein. It seems from a review of the later cases that it is true not only of particular payments which have become due and are immediately payable, but also as to payments which are not immediately payable but may become due at sometime in the future, provided the conditions have all been fulfilled entitling the party to a pension, especially where official action has been taken allowing the pension. The rule may be stated to be that when it has been determined that an officer is entitled to a pension and the pension has been officially allowed, or when the event happens upon which the granting of the pension is dependent, the pension thereupon becomes vested and cannot afterwards be revoked or impaired. This rule is supported by the following authorities, in addition to the authorities cited in the earlier annotations (numerous cases cited)."

Strong cases in support of the vested right theory are:

Kavanagh v. *Police Pension Fund Com'rs*, 134 Cal. 50, 66 P. 36.

Smith v. *Alkin*, 80 Mich. 205, 45 N. W. 136.

Hermanson v. *Board of Pension Com'rs of City of Los Angeles* (*Cal.*) 20 P. (2d) 774.

Lage v. *City of Marshalltown* (*Iowa*), 235 N. W. 761(2).

Gibbs v. *Minneapolis Fire Department Relief Assn.* (*Minn.*), 145 N. W. 1075.

Stevens v. *Minneapolis Fire Department Relief Assn.*, 124 Minn. 381, 145 N. W. 35.

In the *Stevens* case the court said:

> "The situation is wholly unlike the ordinary pension, such as that granted by the Federal Government to dependent soldiers of the Civil War; for there the pension is a mere gratuity or bounty which may be taken away at any moment. * * * In the case at bar, the pension fund is created in part by the payment of dues by the members of the fire department, who may ultimately become pensioners, and the rights acquired by the firemen are analogous to those possessed by members of mutual benefit societies (28 Cyc. 555). We therefore hold that the pension in question is not, as contended by the appellant, a mere gratuity to be granted or withheld at the whim or pleasure of the association."

In the *Stevens* case the suit was against the association for the amounts maturing after the association had, without notice to the plaintiff, determined that he had fully recovered and had discontinued his payments. The plaintiff was permitted to recover, the court going further and recognizing the rule that the action of the association, if clearly arbitrary, would not have been conclusive even if plaintiff had been given notice and an opportunity to be heard.

In answer to the Government's argument that petitioner served only a short while after the Act was amended favorably to him, it should suffice to say that had the Act been amended unfavorably to him a day or so before the contingencies happened, he would have been bound by such unfavorable amendment. See *Clarke* v. *Police Life & Health Insurance Board*, 123 Cal. 24, 55 P. 576; and *Pennie* v. *Reis*, *supra*.

This Court in the case of *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 646, held that the Government can be sued under the Tucker Act in all cases where property to which the Government asserts no title is taken pursuant to an Act of Congress as private property to be applied for public uses. The Court said that the law will imply a promise to make compensation because the Government asserts no title to the property and pointed out that such an implication is consistent with the constitutional duty of the Government as well as with common justice.

Petitioner hardly needs to rely upon any implied promise of the Government. We think it is clear that all of his rights which are expressly set out in the Retirement Act are to be discharged by the Government itself out of the fund which is completely controlled by the Government.

We do not agree with the Government's argument (page 28) that the petitioner's rights will be adequately protected by returning to him the amounts which he has paid or by conceding to him a life annuity of $555.60. To hold that his rights would be protected by this offer or the payment of an annuity in this amount would be to hold that he has no rights. If he does have rights, they are to be determined by and ascertained from his contract, of which Section 8(a) of the Act of June 16, 1933, providing for a thirty-year annuity is a vital part.

III.

The District Court Has Jurisdiction Under the Tucker Act Because the Suit Asserts a Claim Founded Upon a Law of Congress.

In the case of *United States* v. *Hvoslef*, 237 U. S. 1, the plaintiff was suing for the refund of an amount paid for stamp taxes imposed by the Revenue Act of 1898. The two sections of the Act upon which the plaintiff based his

case provided in substance that claims for the refunding of any tax alleged to have been erroneously collected may be presented to the Commissioner of Internal Revenue and that the Secretary of the Treasury was authorized and directed to pay out of any monies of the United States, not otherwise appropriated, to such claimants as should present their claims and should establish such erroneous collection, any sums paid by them to the United States. This Court held that the suit was maintainable under that law of Congress, saying:

> "It thus appears that the Act of 1912, upon which the present claim is based, was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding the described claims and it follows that these claims must be deemed to be founded upon a 'law of congress' within the meaning of the provisions of the Tucker Act * * *."

In the case of *Medbury* v. *United States*, 173 U. S. 492, the plaintiff based her case upon Section 2 and Section 3 of the Act of June 16, 1880, which are in part as follows:

> "Section 2 * * * and in all cases where parties have paid double the minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof or to his heirs or assigns."

Section 3 authorizes the Secretary of the Interior to make the payments provided for in the Act out of any money in the Treasury not otherwise appropriated, and by Section 4 the Secretary is authorized to draw his warrant on the Treasury in order to carry the provisions of the Act into effect. This Court held that the suit was maintainable under the theory that it was founded upon a law of Congress.

In the case of *McLean* v. *United States*, 226 U. S. 374, the suit was brought on the theory that it was founded on a law of Congress, namely, a private relief act passed February 24, 1905, directing the accounting officers to settle and adjust to widow McLean all back pay and emoluments that would have been due and payable to her husband as a major and providing that the amount found due by said adjustment was thereby appropriated to be paid out of any money in the Treasury not otherwise appropriated. This Court held that the suit was properly brought.

In the recent case of *Baltimore Mail Steamship Co.* v. *United States*, 76 F. (2d), 582 (C. S. A. 4th), certiorari denied October 14, 1935, No. 198, the court said:

> "Cases illustrating jurisdiction under the Tucker Act because of some other statute creating a right to sue the United States are easily found."

The court cited the *Hvoslef* case *supra* and *United States* v. *Emory, Bird, Thayer Realty Co.*, 237 U. S. 28. See also the case of *United States* v. *American Tobacco Company*, 166 U. S. 468, where the act which was held sufficient upon which to base a suit against the Government under the Tucker Act provided merely that: "The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions of this title, or of any Internal Revenue Act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, * * *."

We submit that in all of the foregoing cases the intention of Congress to create an obligation resting upon the United States was less clearly expressed than in the Retirement Legislation.

Furthermore, this Court has pointed out that "the great act of justice embodied in the jurisdiction of the court of

claims" is not "to be construed strictly and viewed with an adverse eye."

United States v. *Emory, Bird, Thayer Realty Company, supra.*

IV.

Petitioner's Suit is Not "Brought to Recover Fees, Salary, or Compensation for Official Services."

The Tucker Act excludes from the jurisdiction of the district courts suits brought to recover fees, salary, or compensation. The Government's brief indicates that petitioner must contend that the annuity which he seeks is either a pension or deferred compensation (page 16). We do not think that petitioner is confined to this dilemma any more than the holder of a war risk insurance contract would be. It could as logically be contended that such an insured in claiming the benefits of his policy is seeking either a pension (because of the extremely favorable premium charged) or deferred compensation for his services as a soldier, but this Court, in the *Lynch* case, *supra,* held and all of the Courts, we believe, hold that such contracts are valid.

The Tucker Act uses the words: "fees, salary or compensation." Fortunately, we can turn to the Retirement Act itself to ascertain the meaning of a phrase almost identical. The Retirement Act provides that when the annuity begins "all salary, pay, or compensation" shall cease. Section 6, Act of May 22, 1920, Title 5 U. S. C. 715; section 2, Act of July 3, 1926, Title 5 U. S. C., section 692a. In other words, the Retirement Act itself differentiates between the annuity and "salary, pay or compensation."

The case of *State ex rel Haberlan* v. *Love,* 89 Neb. 149; 131 N. W. 196 holds that an Act of the Legislature of 1895 which provides that cities shall pension all firemen after

twenty-one years of service by paying them 25% of their former salary, does not contravene Section 16, Article 3, of the Nebraska Constitution which reads:

> "The Legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into."

The court said:

> "And a pension granted to a fireman, who has served since the law became effective, cannot be said in reason to be a gratuity, nor the grant of extra compensation."

The case of *Pennie* v. *Reis*, 80 Cal. 266, 22 P. 176, also holds that retirement annuities are not "extra compensation."

It is the same type of annuity which is purchasable from ordinary insurance companies. Of course, like war risk insurance, it is much more favorable to the insured than the usual insurance contract. We are not concerned with the Government's policy in providing these annuities but undoubtedly much can be said for the wisdom of the retirement plan.

As a striking instance of the similarity existing between these annuities and the ordinary insurance contract, we quote the following language from Section 4 of the Act of July 3, 1926, as amended by the Act of May 29, 1930, found in Title 5, U. S. C. Section 694a:

> "And provided further, That any employee at the time of his retirement may elect to receive, in lieu of the life annuity herein described, an increased annuity of equivalent value which shall carry with it a proviso that no unexpended part of the principal upon the annuitant's death shall be returned."

Petitioner has elected to receive an increased annuity under the forfeiture proviso under Section 4 of the amendatory law. (R. 5.)

V.

Congress Never Intended that the Decision of the Bureau of Pensions, Later the Veterans Administration, Later the U. S. Civil Service Commission, Should be Final, Especially Where, as in This Case, Such Decision is Made on Undisputed Facts.

In the *Medbury* case *supra*, this Court held that the decision of the Secretary of the Interior in refusing to make payment where parties had paid double the minimum price for land, which was afterwards found not to be within the limits of a railroad land grant, was not conclusive. It will be observed that the Secretary of the Interior was to pass upon the claim in that case and that the same official was to pass upon claims of annuity under the Retirement Act after the Commissioner of Pensions had taken his final action on such claims. This Court in the *Medbury* case held that the Court of Claims had jurisdiction because the statute which created the right to have repayment under the facts therein stated gave no remedy for a refusal on the part of the Secretary to comply with its provisions. The Court said "We cannot suppose that Congress intended in such cases to make the decision of the Secretary final when it was made on undisputed facts."

In the *McLean* case *supra*, where the proper accounting officers were directed to settle and adjust to widow McLean all back pay and emoluments that would have been due to her husband and the claim was presented to the Auditor of the War Department where it was disallowed in part and where such disallowance was confirmed by the Comptroller of the Treasury, thus giving to the claimant what appears to be a right of appeal from one officer to another, such as

exists under the Retirement Act, giving a right of appeal from the Commissioner of Pensions to the Secretary of the Interior, this Court held that such action of these two officers in settling and adjusting the matter was not final and that jurisdiction lay in the Court of Claims.

Again in the case of *United States* v. *American Tobacco Company,* 166 U. S. 468, it appears that petitioner's claim was unfavorably passed upon by the Internal Revenue Collector and thereafter the Treasury Department rendered its decision declining to allow the claim and thereafter rendered another decision declining to grant a rehearing, yet this Court held that the suit could be maintained in the Court of Claims. The statute in that case provided that the Commissioner of Internal Revenue could, upon receipt of satisfactory evidence of the facts, make allowance for or redeem revenue stamps purchased but not used.

In the case of *United States* v. *Emory, Bird, Thayer Realty Co. supra* which was a suit under the Tucker Act brought in the District Court to recover the amount of taxes paid under protest, it was contended that the only remedy was a suit against the Collector. This Court held that the District Court had jurisdiction. The Court said:

> "It is true that this tax law provides that 'all laws relating to the collection, remission and refund of Internal Revenue taxes, so far as applicable,' etc., are extended to this tax (Section 38, 36 Stat. at L. 117, Chap. 6), but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the collector for an unjustified collection was given by the common law."

VI.

Petitioner is Not Limited to a Proceeding for Mandamus.

In the recent case of *Miguel* v. *McCarl,* 291 U. S. 442, it was contended that mandamus should not have been brought

in that case because the petitioner had a right to sue in the Court of Claims for his retired pay. It is true that this Court found no merit in that contention, but it seems that under the facts of this case it would, in the language of the late Justice Holmes in the *Emory, Bird, Thayer Realty Company* case *supra:* "—be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims."

Fortunately, this identical question has been decided in the case of *Hayes* v. *Mayor and Council of City of Hoboken,* 93 N. J. L. 432, 108 A. 868(3). The Court said:

> "Next it is said the plaintiff was without right to enforce her claim by a common-law action, but was limited to a proceeding by mandamus. There seems to be nothing in this point. She may proceed by mandamus, but she is not compelled to resort to that remedy. If mandamus had been applied for, and the Court in its discretion had refused the writ, it is clear the plaintiff could even then pursue her common-law remedy. *Clarke* v. *Earle,* 42 N. J. Law 94, 97. She may be compelled to enforce her judgment by mandamus, but her right to a trial by jury is not affected thereby."

VII.

The Court Properly Rendered a Declaratory Judgment.

Petitioner's claim is not in excess of $10,000.00. He sought and obtained a judgment for monthly installments accruing to date of judgment. The judgment is in the amount of $1476.45. The Court also declared that future installments, under the present contract, would fall due monthly. That is the only natural and logical result from the judgment in petitioner's favor. If he had a valid contract on the date of judgment and nothing had happened to invalidate that contract, future installments would auto-

matically fall due with or without a declaratory judgment. And, if in the future anything should happen to invalidate the contract, such new defense could no doubt be made to appear when application would have to be made to the Court for coercive relief.

28 *U. S. C.* 400.

Nor does it follow that since petitioner has a life expectancy of 15.39 years, the jurisdictional limitation of the District Court has been exceeded. The trial court may have seen petitioner and have concluded that he could not be expected to live out his expectancy. The trier of fact is not bound by the mortality tables.

VIII.

On the Merits of the Case, Petitioner as a Field Deputy Marshal was an Employee of the United States.

Petitioner feels that this point was adequately covered in his brief in support of petition for writ of certiorari. He desires, however, to reply briefly to the argument in the Government's brief at page 32 to the effect that time served by a field deputy marshal is not within the purview of the Retirement Act because of Section 3 of the Act of May 29, 1930, which reads:

> "Provided, that these groups shall include only those employees whose tenure of employment is not intermittent nor of uncertain duration."

We fail to see any basis for a contention that the employment of petitioner as a field deputy marshal was intermittent or of particularly uncertain duration. He served as a field deputy continuously for six years, four months and fourteen days (R. 14). Of course, he could have been removed from office as most other employees can. As appears from page 31 of the Government's brief, prior to the Act

of May 28, 1896, he was removable from office by the Judge of the District or Circuit Court and, after the passage of that Act, he held office during the pleasure of the marshal, unless sooner removed by the District Court.

It is doubtful, however, whether the above quoted proviso from Section 3 of the Act of May 29, 1930, has any application to service rendered prior to the effective date of the Retirement Act in 1920. The quoted proviso would seem to refer only to unclassified employees of the United States in all cities and in all establishments or offices in which appointments are made under labor regulations approved by the President or from sub-clerical or other registers for the classified service, and unclassified employees transferred from classified positions, which are the only groups mentioned in sub-section (d) of Section 693a of Title 5, U. S. C. Certainly the quoted proviso does not apply to subsection (c), because it has a similar provision of its own.

The Act specifically provides that the period of service "shall be computed from the date of original employment, whether as a classified or an unclassified employee in the Civil Service of the United States * * *, including periods of service at different times and in one or more departments, branches, or independent offices, or the legislative branch of the Government, and also periods of service performed overseas under authority of the United States, and periods of honorable service in the Army, Navy, Marine Corps or Coast Guard of the United States; * * * all periods of separation from the service, and so much of any leaves of absence as may exceed six months in the aggregate in any calendar year, shall be excluded, except * * *." (Section 5 of the Act of May 29, 1930, Title 5, U. S. C. 695a.)

It appears, therefore, that petitioner is entitled to credit for service rendered as a field deputy marshal from the date of his original employment, although such service was

rendered as an unclassified employee. It appears, too, that even if he had not served continuously as a field deputy and had been separated from the service for intervals, he nevertheless would get credit for the time he actually served.

Statutes of this general type are to be liberally construed.

O'Dea v. *Cook*, 169 P. 366 (1), 176 Cal. 659.
Klench v. *Stockton*, 249 P. 46 (Cal. Appeals).
43 *C. J. P.* 813, Sec. 1408.

Conclusion.

We respectfully submit, therefore, that the judgment of the Fifth Circuit Court of Appeals should be reversed, so that the finding in petitioner's favor in the District Court can stand.

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All of Macon, Georgia.

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No. 199

In the Supreme Court of the United States

OCTOBER TERM, 1935

FREDERICK D. DISMUKE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The judgment of the District Court (R. 11) was entered on findings of fact and conclusions of law (R. 9–11) but without opinion. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 48–54) is reported in 76 F. (2d) 715.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 19, 1935 (R. 54). A petition for a rehearing was denied May 29, 1935 (R. 55). The petition for a writ of certiorari was filed July 1,

1935 (R. 55), and was granted October 14, 1935 (R. 55). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a suit against the United States brought under the Tucker Act, a United States district court has jurisdiction of a claim to recover an annuity of a retired civil-service employee.

2. Whether a claimant to an annuity under the Civil Service Retirement Act is restricted exclusively to the administrative remedies provided by the statute.

3. Whether failure to provide for a judicial review of an administrative decision denying a claim for an annuity under the Civil Service Retirement Act violates the due process clause of the Fifth Amendment.

4. Whether, in a suit brought under the Tucker Act, a district court has jurisdiction to render a declaratory judgment against the United States.

5. Whether a field deputy marshal, during the period from December 16, 1895, to April 30, 1902, who was paid on a fee basis, was an employee of the United States in the sense that time served in such capacity may be computed as accredited service in determining eligibility to an annuity.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 35–39.

STATEMENT

The facts, as disclosed by the record, may be summarized as follows:

On December 16, 1895, the petitioner was appointed a deputy United States marshal for the Northern District of Georgia (R. 14), and served continuously as a field deputy marshal on a fee basis until April 30, 1902 (R. 15). On February 7, 1902, he was appointed postmaster at Thomasville, Georgia, and continued to hold such office until April 27, 1914 (R. 15). The petitioner was appointed Federal Prohibition Director on September 10, 1921, and continued in the service of the United States until June 30, 1933 (R. 15). The aggregate period of service in these three capacities exceeds thirty years. Excluding the time served as a field deputy marshal, the petitioner's service exceeds twenty-four years, but is less than thirty years. On June 30, 1933, the petitioner was involuntarily separated from the service for reasons other than his misconduct, the reason for his separation from the service being a reduction in the force (R. 15). On June 27, 1933, he addressed a letter to the Director of Insurance, Veterans' Administration, Washington, D. C., stating that he had been a government employee for over thirty-one years; that he was fifty-eight years of age, and requested that he be advised as to the amount of money he would be required to refund in order to obtain the benefits of the Retirement Act (R. 15). The petitioner was advised that he should

deposit with the Treasurer of the United States the sum of $970.09 (R. 16), which he did. This contribution covered the period of service from September 10, 1921, to February 29, 1928 (R. 15–16). Deductions had been made from the petitioner's salary under the Retirement Law from February 29, 1928, to the end of his service (R. 17). The total amount contributed by the petitioner to the Retirement Fund was approximately $1,650 (R. 17).

Shortly after June 30, 1933, the petitioner filed a claim with the Administrator of Veterans' Affairs for an annuity under the provisions of Section 8 (a) of the Retirement Act of June 16, 1933 (R. 17),[1] which authorizes the payment of such

[1] The Federal Civil Service retirement plan was created on August 1, 1920, by the Act of May 22, 1920, c. 195, 41 Stat. 614. The scheme provides for a retirement annuity for employees in the Federal classified civil service. The privilege of receiving the annuity and its amount depends upon the length of the employee's service. Commencing August 1, 1920, a deduction is automatically made from the compensation of each employee covered by the plan and deposited in the retirement fund. This deduction originally amounted to 2½% of the base pay, but it was subsequently raised to 3½%. However, the Act provided that automatic credit shall be given for all service performed by the employee prior to August 1, 1920, without exacting any contribution with respect to such prior service. As to service performed for any period subsequent to August 1, 1920, a contribution is required in order to give credit for such service toward the retirement annuity, and if no deduction has been made for any period subsequent to that date, the employee may make a lump-sum contribution to cover such period, in order to receive credit therefor. The plan, as it

annuities to retired government employees who have rendered at least thirty years of service. On or about December 26, 1933, he was informed that his claim was rejected because he had not rendered thirty years of allowable service, as required by the Act, in that his service as a Field Deputy United States Marshal was excluded upon the ground that

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has been amended from time to time, provides for a number of different types of annuities:

1. An employee reaching a specified retirement age, who has had at least 15 years of service, is entitled to a retirement annuity upon severing his connection with the service. For most groups of employees the retirement age is 70, although for certain specified classes it is 65 or 62. The full annuity amounts to three-fourths of the average annual pay, not exceeding $1600 per annum, for any five-year period of service selected by the employee. In order to receive the full annuity, however, the employee must have credit for at least 30 years of service. If the period of service was at least 15 years, but less than 30, the annuity is proportionately diminished. If the period of service is less than 15 years, no annuity is payable.

2. If the employee is retired for disability at any time, he is entitled to receive a retirement annuity. In the original Act a minimum of 15 years of service was required to qualify the employee for such an annuity, but by the Act of May 29, 1930, this period was reduced to 5 years.

3. Under Section 7 of the Act of May 29, 1930, any employee, who at the age of 45 or over, is involuntarily separated from the service for reasons other than his own misconduct or delinquency, and who has had at least 15 years of service, is entitled to an annuity commencing at the age of 55. The amount of such annuity likewise depends on the average salary and length of service, and if it commences at an age below 70, it is payable in a reduced amount computed according to life expectancy. It is not disputed that the petitioner is entitled to an annuity under this provision,

field deputy marshals were employees of the marshal and not of the United States (R. 17–18).[2] The petitioner was also advised that he would be allowed one year from that date within which to enter an appeal to the Administrator of Veterans' Affairs, and a copy of the rules of practice in the matter of appeal was enclosed (R. 18). He was further advised that he was at liberty to furnish material evidence for the purpose of obtaining further consideration, and that should such additional evidence be deemed sufficient to warrant reopening the case,

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but he claims an annuity in a larger amount under the provision discussed in the next paragraph.

4. Section 8a of the Act of June 16, 1933 (Independent Offices Appropriation Act for 1934), which was in effect from June 16, 1933, until June 30, 1935, provided that a person who had not reached the retirement age, but who was involuntarily separated from the service by reasons other than his own misconduct, was entitled to a retirement annuity, provided he had fulfilled at least 30 years of service. The petitioner claims his annuity under this provision. His claim was denied on the ground that he had only 24 years of service, and was, therefore, limited to the smaller annuity referred to in the preceding paragraph.

The plan also contains provisions for a refund to the employee, or to his estate, in the event that the amount of annuity drawn by him is less than the amount that would be purchased by his contribution, or in the event that he resigns or is separated from the service prior to the accrual of an annuity.

[2] According to the ruling of the Veterans' Administration, the plaintiff is entitled to an annuity of $555.60 per annum based on 24 years' service, instead of an annuity of $1181.16, based on 30 years' service, which he claims (R. 21).

such action would be taken (R. 18). The petitioner appealed from the decision of the Director to the Administrator of Veterans' Affairs, and on March 13, 1934, the Board of Veterans' Appeals approved the decision of the Director of Insurance (R. 18–20).

The petitioner thereupon brought suit in the United States District Court for the Middle District of Georgia, to recover the amount claimed as a civil service retirement annuity under Section 8 of the Act of June 16, 1933 (R. 1–6). A demurrer to the petition (R. 8) was overruled (R. 9). An answer was thereupon filed (R. 6–8), and the case was tried on a stipulation of facts, with some additional evidence (R. 14–43). The court entered judgment in favor of the petitioner, awarding him the sum of $1,476.45, representing fifteen monthly instalments accruing from July 1, 1933, through the month of September, 1934 (R. 11). A further declaratory judgment was entered awarding the petitioner monthly instalments of $98.43 from October 1, 1934, until January 21, 1945, and monthly instalments of $102.00 from January 21, 1945, until the date of his death (R. 11). The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and remanded the cause with directions to dismiss the claim, one judge dissenting (R. 54).

SUMMARY OF ARGUMENT

1. The Tucker Act does not confer jurisdiction on a district court to entertain a suit for an annuity under the Civil Service Retirement Act. There does not exist a contract, either express or implied, between the United States and the annuitant. The United States has not agreed to pay any annuity whatsoever, but has merely by law provided for the creation of a fund out of which such annuity is to be paid. Nor is the claim one based upon a law of Congress within the meaning of the Tucker Act. In order that a claim may be founded upon a law of Congress, the Act in question must either grant the right to bring the action or create an obligation on the part of the United States in favor of the one asserting the claim. The Civil Service Retirement Act does neither.

Moreover, a claim for an annuity partakes of the nature of a pension, and the claim for the particular annuity which the petitioner here seeks is in substantial part a pension, because in order to obtain the required number of years of accredited service to come within the rate of annuity for the thirty-year period, it is necessary that he be given credit for past services performed, during which period the petitioner made no contributions. The Tucker Act expressly excludes pensions from the jurisdiction of the courts.

Finally, the judgment of the District Court, considered in the light of the fact that there was included therein a declaratory judgment, exceeded

the jurisdictional limit of $10,000, to which sum the Tucker Act limits the district courts.

2. The United States may not be sued without its consent, and is subject to suit only upon such terms and conditions as it may see fit to permit. It may provide an exclusively administrative remedy. Consideration of the Civil Service Retirement Act indicates clearly, we believe, that the remedy provided for an annuitant is exclusively administrative. If, however, any right of judicial review exists, it is limited exclusively to mandamus proceedings against an administrative official who either refuses to act or acts in plain violation of the Retirement Act. The lack of judicial review does not operate in the instant case to deprive the petitioner of property without due process of law. He may have returned to him the sum which he has deposited in the retirement fund, together with the accumulated interest, or he may receive the annuity of the fifteen-year period which amounts to over $550 per annum.

3. District Courts of the United States do not have jurisdiction to enter a declaratory judgment under the Tucker Act. When entertaining a claim under that Act, the district courts sit as courts of claims, and can perform such functions only as are authorized by the Tucker Act. The Tucker Act authorizes only a money judgment against the United States, and therefore no authority exists to enter a declaratory judgment.

4. A field deputy marshal, between the years 1895 and 1902, paid on a fee basis, was not an employee of the United States, but was an employee of the marshal only. His status has so been determined by this Court.

ARGUMENT

I

THE TUCKER ACT DOES NOT CONFER JURISDICTION ON A DISTRICT COURT TO ENTERTAIN A SUIT FOR AN ANNUITY UNDER THE CIVIL SERVICE RETIREMENT ACT

The Tucker Act, *infra,* p. 35, confers original jurisdiction upon district courts, concurrently with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States, or any law of Congress, upon a regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable.

The petitioner brought the instant suit in the United States District Court for the Middle District of Georgia, for an annuity under the provisions of Section 8 (a) of the Act of June 16, 1933, *infra,* p. 39, which authorized the payment of an annuity to a civil service employee who was involuntarily separated from the service after having had

more than thirty years of accredited service with the Government.

The theory upon which the petitioner apparently relies is that by the contribution of certain sums to the Civil Service Retirement Fund, a contractual relationship was established between him and the Government for the payment of the annuity, and that the refusal of the governmental agency charged with the administration of the Act to pay the annuity to which he felt he was entitled gave rise to a claim justiciable under the Tucker Act. The petitioner also suggests that should it be held that no contract exists, nevertheless the District Court had jurisdiction under the Tucker Act, as the claim is one founded upon a law of Congress. We submit that each of these contentions of the petitioner is unsound.

Obviously, no express contract exists between the petitioner and the United States, and the petitioner does not so argue. If any contract exists, it must be one implied in fact, and one which has resulted from the actions of the petitioner and the United States when considered in the light of the Civil Service Retirement Act. An analysis of that Act, we believe, clearly indicates that no contractual obligation which would bind the United States could possibly arise under the circumstances disclosed in the instant case.

The Civil Service Retirement Act, together with its amendments, provides a comprehensive plan for the retirement of Federal civil-service employees

who have reached a certain age, and who have completed a certain period of service. It constitutes a compulsory contributory pension system to be administered by certain specified agencies of the Government. The fund out of which the retirement annuity is to be paid is created in part by compulsory contribution on the part of the civil-service employees and in part by Government contributions. The Act does not bind the United States to pay annuities from its general Treasury, but provides only that when certain conditions have been met a civil-service employee shall be entitled to be paid an annuity out of the retirement fund. In respect of the retirement annuity, no privity of relationship exists between the United States and an employee. If any such relationship exists, it is one between the employee and the fund to which he has contributed. The United States, therefore, having neither directly contracted with the petitioner for the payment of his annuity, nor being required by law to pay him any such annuity, we submit that no contractual relationship exists between them. It is only where the United States is directly obligated that a contract within the meaning of the Tucker Act exists. See *Hijo* v. *United States,* 194 U. S. 315; *Bigby* v. *United States,* 188 U. S. 400; *United States* v. *Minnesota Mutual Investment Co.,* 271 U. S. 212. This Court has held that the consent of the United States to be sued in contract, express or implied, is restricted to express contracts or contracts implied in fact, i. e., real contracts, and

does not extend to quasi contracts or contracts implied in law by means of a legal fiction. *Alabama* v. *United States,* 282 U. S. 502, 506; *Merritt* v. *United States,* 267 U. S. 338, 341; *Baltimore & Ohio Railroad Co.* v. *United States,* 261 U. S. 592, 597; *Sutton* v. *United States,* 256 U. S. 575, 581.

Even if a privity of relationship existed between the annuitant and the Government, there is lacking the element of mutual consent, which is essential in order to give rise to a contract. A civil service employee is compelled by law to contribute to this fund. He has no option in the matter. The consensual element of a contract is lacking and there is no meeting of the minds. A contract must be based on the consent of both parties. *Williston on Contracts,* Sec. 18; *Page on Contracts,* 2nd Ed., Sec. 70; *Elliot on Contracts,* Sec. 6.

The noncontractual basis of petitioner's claim is brought into clear relief by the circumstances upon which it rests. His claim for an annuity based on 30 years' service is, in greater part, founded on service prior to August 1, 1920, when the original Act became effective, and for which he has made no contributions. After its passage, when petitioner was reemployed by the United States, he had no alternative but to make the contributions—assent was unnecessary and avoidance was impossible. Petitioner was retired from the service on June 30, 1933. He seeks an annuity under the Act of June 16, 1933, passed but two weeks prior to his separa-

tion from the service. It seems clear that, throughout the course of petitioner's service, he has at no time entered into relations with the Government which can be said to give rise to a contract implied in fact.

Likewise, it seems clear that this action is not one based upon a law of Congress, because the Civil Service Retirement Act merely creates the fund out of which the annuity is to be paid.[3] In order that a claim may be founded upon a law of Congress, and therefore cognizable in a district court under the Tucker Act, the Act of Congress must either grant the right to bring the action or create an obligation on the part of the United States in favor of the one asserting the claim. *United States* v. *Hvoslef*, 237 U. S. 1, 10; *Medbury* v. *United States*, 173 U. S. 492, 497; *McLean* v. *United States*, 226 U. S. 374, 378; *Baltimore Mail Steamship Co.* v. *United States*, 76 F. (2d) 582 (C. C. A. 4th), certiorari denied October 14, 1935, No. 198.

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[3] In *Deutsch-Australische* v. *United States*, 59 C. Cls. 450, it was held that a claim for the release of certain vessels, seized at the outbreak of the war with Germany, was not a suit based upon a law of Congress, as the law in question had merely authorized the seizure of the vessels but had created no obligation on the part of the United States to pay therefor. In *Baltimore Mail Steamship Co.* v. *United States*, 76 F. (2d) 582 (C. C. A. 4th), it was held that a law restricting the interest to be paid upon steamship loans furnished no basis for the recovery of an amount exacted in excess thereof.

In the instant case, the Civil Service Retirement Act does not grant the right to an employee to bring an action against the United States for the recovery of any annuity or any sum contributed to the Civil Service Retirement Fund. Nor does it create any obligation on the part of the United States in favor of such employee. The Act does not provide that the United States shall pay the annuity, but only that the annuity shall be paid out of a particular fund. The intention of Congress (see Sec. 15 of the Act of May 22, 1920) that the fund should be augmented by annual appropriations does not create an obligation of the United States in favor of the petitioner.[4] We submit, therefore, that the claim of the petitioner is not one founded upon a law of Congress so as to bring it within the jurisdiction of the Tucker Act.

Not only does the claim here asserted fail to constitute one of the class, jurisdiction over which is conferred upon the district courts, but conversely, it is a claim over which jurisdiction has been expressly withheld from such courts.

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[4] Only one of the committee reports appears to throw light on the character of the obligation of the United States. H. Rept. No. 784, 71st Cong., 2nd Sess., in reporting the bill which became the Act of May 21, 1930, *infra*, said (p. 10) that the "bill will make definite and certain the obligation of the Government to appropriate for the purpose of meeting its obligations under the system." Its obligations are plainly those of supporting the system, and do not run to any individual annuitant.

Under the terms of the Tucker Act, no suit will lie for the recovery of a pension.[5] A civil-service retirement annuity partakes more of the nature of a pension than a contract obligation. A pension has been defined as "An annuity from the government for service rendered in the past" *Aetna Insurance Co.* v. *Jones,* 78 S. C. 445; "A bounty for past services rendered to the public" *Price* v. *Savings Society,* 64 Conn. 362; "A regular allowance paid to an individual by the government in consideration of past services, or in recognition of merit" *Hawkins* v. *Randolph,* 149 Ark. 124. At the time that the original Act was under consideration, it was obviously the intention of Congress that the retirement fund should be created by equal contributions on the part of employees and the Government. The committee reports make plain that the plan was regarded as a system which stood midway between a wholly contributory system and one confined solely to pensions. House Report No. 120, 66th Cong., 1st Sess., pp. 3–4 (adopted by ref-

[5] It should be noted that in this respect the jurisdiction of the district courts under the Tucker Act is considerably narrower than is the jurisdiction of the Court of Claims (Judicial Code, Sec. 24, Subsec. 20; U. S. Code, Title 28, Sec. 41, Subsec. 20). Thus, the Tucker Act expressly provides that the district courts shall not have jurisdiction over cases brought to recover fees, salary or compensation for official services of officers of the United States. This limitation is not contained in the statute regulating the jurisdiction of the Court of Claims. Any argument that the annuity is not a pension, but rather deferred compensation, would thus impale itself on this jurisdictional provision.

erence in House Report No. 942, 66th Cong., 2nd Sess.); Senate Report No. 99, 66th Cong., 1st Sess., p. 4. Any contribution on the part of the Government is, of course, a gratuity, and any system based in substantial part on these contributions is a pension system.

When the Act was adopted in 1920, over six thousand employees who had passed the retirement age at that time were retired during the ensuing fiscal year with annuities ranging from $180 to $720 per year.[6] Under the Act of July 3, 1926, a more liberal method of computation was provided, which increased all annuities theretofore granted, and increased the maximum annuity to $1000 per annum. Again, under the Act of May 29, 1930, maximum annuity payments were further increased to $1200 per annum. All annuities were drawn from the civil service retirement fund, and it is obvious that the amount of the annuity or pension bears but a minor relation to the amount of money contributed by the annuitant.[7] Clearly, an employee who was

[6] Report of Commissioner of Pensions for fiscal year ended June 30, 1921, p. 33.

[7] The Act of May 29, 1930, *infra*, provides, in effect, that in computing compensation the annuity shall be composed of a sum equal to $30 for each year of service not to exceed thirty provided that this sum does not exceed three-fourths of the annual maximum basic salary for any consecutive five-year period plus the amount of annuity purchasable with the amount which stands to the credit of the annuitant in the fund. It seems clear that the basic contribution of thirty dollars for each year's service is to be borne exclusively by the Government.

retired in 1920, after a contribution of a few dollars, did not have a contract with the Government to draw $1200 per annum after 1930. The money paid to such individuals constitutes a pension, pure and simple, and, we submit, clearly indicates that the entire purpose of the Act was to provide a compulsory contributory pension system.[8]

We do not perceive wherein the annuity which the petitioner claims differs in its essential characteristics from those of persons whose retirement pay constitutes a simple pension. An analysis of the petitioner's contention clearly discloses the pension element which exists in the claim which he attempts to assert.

We suggest that this Court should take judicial notice of the fact that payment by the petitioner of $1650 was wholly insufficient to purchase an annuity of approximately $1200 per annum for a man of fifty-eight years of age, and that there must, therefore exist in such annuity the element of recognition of his past services. The gravamen of the instant suit is that in estimating the time served as an employee of the United States, the administrative authorities improperly excluded time which the petitioner served as a field deputy marshal between the years 1895 and 1902, and it was to review that specific disallowance that the case at bar was instituted. When the Civil Service Retirement Act was

[8] It may not be wholly without significance that the administration of the Retirement Act was originally entrusted to the Commissioner of Pensions.

passed in 1920, in computing the length of service and the annuities based thereon, allowance was made for past service, and no contribution in respect of such past service was required of the employee. In including, therefore, the period of time prior to 1920 and giving the same an equal effect with periods subsequent thereto during which the employee contributed, the Government, at least in so far as the prior period was concerned, in effect gave the employee a gratuity. So far as the petitioner is concerned, the administrative authorities gave him credit for over twelve years' service prior to 1920, as well as credit for approximately the same length of service subsequent to 1920. The petitioner unquestionably is entitled, on the basis of these allowances, to an annuity based on a twenty-four-year period of service which amounts to $555.60 per annum (R. 21). He, however, claims that an additional period of over six years' service between 1895 and 1902 should be allowed which would entitle him to the annuity of the thirty-year period. The inclusion of that period in computing the length of the service rendered by the petitioner would be a mere gratuity on the part of the Government which it was at liberty to grant or withhold. Should the United States at some subsequent time amend the Civil Service Retirement Act so as to provide that retirement compensation be based solely upon service rendered subsequent to 1920, it could not be urged that there was a breach of any contractual

relationship. As this Court stated in *Lynch* v. *United States*, 292 U. S. 571, 577:

> Pensions, compensation allowances, and privileges are gratuities. They involve no agreement of the parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *United States* v. *Teller*, 107 U. S. 64, 68; *Frisbie* v. *United States*, 157 U. S. 160, 166; *United States* v. *Cook*, 257 U. S. 523, 527.

We think it clear, therefore, that irrespective of whether a contractual right existed in respect of the periods for which the petitioner contributed, it would be a mere gratuity, for which no action lies under the Tucker Act, to give him credit for periods in respect of which he made no contribution.

Finally, we contend that the judgment entered by the District Court exceeded the amount to which its jurisdiction was circumscribed by the Tucker Act. In addition to entering judgment for $1,476.45, the District Judge undertook to render a declaratory judgment in the amount of $1,181.16 per annum from October, 1934, to January 21, 1945, and thereafter monthly instalments in the amount of $102.00. While we urge that the District Court was without jurisdiction to enter a declaratory judgment (See Point III, *infra*), nevertheless, should it be held that a district court sitting as a court of claims under the Tucker Act possesses ju-

risdiction to enter a declaratory judgment, we submit, in the light of the life expectancy of the petitioner the jurisdictional limitation of the District Court has been exceeded.[9] See *Brotherhood of Locomotive Firemen and Enginemen* v. *Pinkston*, 293 U. S. 96. The amended complaint asks (R. 6) a declaratory judgment as to future payments; as a result it presents a claim exceeding $10,000 and deprives the District Court of jurisdiction to hear the cause.

II

THE ADMINISTRATIVE REMEDY AFFORDED BY THE CIVIL SERVICE RETIREMENT ACT IS EXCLUSIVE

The law is well settled that the United States may be sued only in such courts and on such conditions as it may see fit. *United States* v. *Babcock*, 250 U. S. 328, 331; *Schillinger* v. *United States*, 155 U. S. 163, 166. It is likewise well settled that it may establish rights against itself without remedy to enforce such rights and that it may grant a remedy purely administrative to the exclusion of the courts. *Tatum* v. *United States*, 270 U. S. 568, 576; *Lynch* v. *United States*, 292 U. S. 571, 581–582.

It seems clear, from the intricate machinery set up in the various governmental departments for the purpose of carrying the provisions of the Re-

[9] The American Experience Table of Mortality places the life expectancy of a man of 58 at 15.39 years.

tirement Act into effect and from the provisions for appeals from administrative decisions, that the Congress contemplated solely an administrative procedure and intended the remedy accorded by the Act to be exclusive. Manifestly, Congress would not have provided this complex system had it intended to give rise to claims justiciable in the courts under the Tucker Act.

Thus Section 13 of the Act of 1926, as amended by the Act of 1930 (c. 349, 46 Stat. 468, 477), provides that applications for annuities shall be in the form prescribed by the Commissioner of Pensions, and, insofar as may be necessary to determine the rights of the applicant, shall be supported by certificates from the heads of departments, branches, or independent offices of the Government in which the applicant has been employed. Upon receipt of satisfactory evidence, the Commissioner of Pensions is directed forthwith to adjudicate the claim of the applicant, and if the right of the applicant to an annuity be established, a certificate to that effect is to be issued to the annuitant.[10]

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[10] By Executive Order dated July 21, 1930, the functions of the Bureau of Pensions were transferred to the Veterans' Administration. By Executive Orders dated April 7, 1934, and June 5, 1934, the functions vested in the Veterans' Administration pertaining to the administration of Civil Service Retirement activities were transferred to the United States Civil Service Commission.

Section 15 of the Act, reenacted May 29, 1930, c. 349, 46 Stat. 468, 478, requires the Civil Service Commission to keep a record of appointments, transfers and changes in grade, separations from service, and other data concerning individual service, as may be deemed essential to a proper determination of the rights conferred by the Act and to furnish the Commissioner of Pensions with such information therefrom as he shall request, for the proper adjustment of any claim arising under the Act.

Section 16 of the Act, reenacted May 29, 1930, c. 349, 46 Stat. 468, 478, provides for the creation of a board of actuaries charged with the duty of recommending to the Commissioner of Pensions such changes as may be deemed necessary to protect the public interest and to maintain the system on a sound financial basis, and to prepare such tables as may be required by the Commissioner of Pensions for the purpose of computing annuities.

Section 17 of the Act, reenacted May 29, 1930, c. 349, 46 Stat. 468, 478, authorizes the Commissioner of Pensions, under the direction of the Secretary of the Interior, to perform all acts and to make such rules and regulations as may be necessary and proper to carrying out the provisions relating to the benefits conferred by the Act. It also provides that—

> An appeal to the Secretary of the Interior shall lie from the final action or order of the

> Commissioner of Pensions affecting the rights or interests of any person or of the United States under this Act, the procedure on appeal to be as prescribed by the Commissioner of Pensions, with the approval of the Secretary of the Interior.

The Commissioner, through the Secretary of the Interior, is also required to report to the Congress all receipts and disbursements in respect of annuities or other provisions of the Act. The Secretary of the Interior submits annually to the Bureau of the Budget estimates of the appropriations necessary to finance the Retirement and Disability Fund.

This Court has on repeated occasions held that statutes, such as the one under consideration, confer no right to sue, but only the right to administrative determination. *Meadows* v. *United States,* 281 U. S. 271 (application for reinstatement of a lapsed policy under the World War Veterans' Act); *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551 (claim for review of a special assessment of war and excess-profits taxes); *United States* v. *Atchison, Topeka & Santa Fe R. Co.,* 249 U. S. 451 (claim for additional compensation for transportation); *Silberschein* v. *United States,* 266 U. S. 221 (claim for veterans' disability compensation); *United States* v. *Williams,* 278 U. S. 255 (claim for adjusted compensation); *United States* v. *Babcock,* 250 U. S. 328 (claim for com-

pensation for loss of personal property suffered by an officer in the Army). These cases, we submit, are controlling.

The reasoning of this Court in the *Williamsport* case (277 U. S. at 561) would seem to be particularly apposite in the case at bar. Jurisdiction, if any, must rest upon the provisions of the Tucker Act, which long antedates the Retirement Act. And it appears by the latter Act, and the amendments thereto, that the Congress intended to vest final authority in an administrative agency.

Whenever the Congress grants a specific remedy on a claim against the Government, the presumption is that the remedy is exclusive, and that no suit may be brought thereon under the Tucker Act. *United States* v. *Atchison, Topeka & Santa Fe R. Co., supra; United States* v. *Babcock, supra; United States* v. *Pfitsch,* 256 U. S. 547. For example, in view of the fact that a specific remedy is granted by the World War Veterans' Act for the adjudication of a claim for benefits arising under a veterans' insurance policy, no suit thereon lies in the District Court under the Tucker Act, *Mara* v. *United States,* 54 F. (2d) 397, 399 (S. D. N. Y.), or in the Court of Claims, *McBean* v. *United States,* decided November 5, 1934, not yet reported.

The petitioner, however, contends that even if it be conceded that all questions of fact in relation to the computation of an annuity are to be decided

by an administrative official, nevertheless a decision of the administrative official is conclusive only on questions of fact, and that questions of law are open to judicial review. He states that in the instant case there is no disputed question of fact, but only a disputed question of law, namely, whether a field deputy marshal is an employee of the United States. On page 26 of his brief, the petitioner sets forth a number of cases which he contends support his proposition that a right of judicial review exists.

While it is true that these cases support the general proposition that where rights are to be determined by an administrative official, only his determination of questions of fact is final, and that any obvious error of law which he commits is subject to judicial review, nevertheless they also support the proposition that the Congress can, by appropriate legislation, completely remove from the courts any power of review. However, in the case at bar, it is unnecessary to determine if Congress did in fact intend to preclude any judicial review. It may well be that if the ruling of an administrative official on questions of law is obviously incorrect, the petitioner might bring a writ of mandamus to compel the issuance of an annuity certificate and if upon the issuance of such certificate the compensation provided therein was not paid, mandamus again would lie to compel such payment. As was stated by this Court in *Miguel* v. *McCarl,* 291 U. S. 442, 451:

> Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary.

We submit, therefore, that the sole remedy of which the petitioner may avail himself is that of mandamus.

Still another reason impels us to submit that a suit will not lie in a district court under the Tucker Act for the recovery of compensation. The annuity is payable from the Civil Service Retirement and Disability Fund. This fund is specifically exempt from attachment or any other legal process.[11] Under the plain language of the statute, no judgment of any court can possibly reach this fund. Were judgment given in favor of the petitioner, it would follow that, unless the law were changed, this judgment would have to be satisfied out of the ordinary revenues of the Government after the judgment had been reported to Congress for appropriation. This is plainly contradictory of the Retirement Act, which contemplates the payment of annuities from the fund alone. It follows

[11] Section 18 of the Act, reenacted May 29, 1930, c. 349, 46 Stat. 479 (U. S. C., Title 5, Section 729), provides:

"None of the moneys mentioned in this Act shall be assignable, either in law or equity, or be subject to execution, levy, or attachment, garnishment, or other legal process."

that the remedy conferred is exclusively administrative.

The petitioner contends that if the rule of the decision below be affirmed, he will be deprived of his property without due process of law. This contention is without merit and fails to give consideration to the remedies, administrative in nature, which are still open to him. He may, by administrative methods, recover the entire amount which he has contributed to the Retirement Fund, together with interest compounded thereon, or he may by administrative procedure obtain the considerably more valuable benefit of a life annuity of $555.60.[12] Thus the petitioner's rights are adequately protected. A contract should be clearly proved before it invokes the protection of the Federal Constitution. *Town of Concord* v. *Savings Bank,* 92 U. S. 625, 630. Under the administrative rulings the petitioner will receive an annuity much more valuable than the amount of his contributions. He therefore complains only that he has not been given as large a gratuity as he would like. The situation thus seems indistinguishable from that of a pension, which the Government may bestow or withdraw at its will. *Lynch* v. *United States, supra,* 577, and cases cited. Moreover, there is no vested right to sue the Government. The Congress may grant consent to be sued or withdraw such consent at will, and such action does not constitute a depriva-

[12] Section 7 of the Act of May 29, 1930, c. 349, 46 Stat. 468, 474.

tion of due process of law. *Lynch* v. *United States, supra; United States* v. *Babcock, supra; Schillinger* v. *United States, supra.* We think it clear, therefore, that no constitutional rights of the petitioner have been denied by the decision of the court below.

III

A DISTRICT COURT HAS NO JURISDICTION TO RENDER A DECLARATORY JUDGMENT IN A SUIT AGAINST THE UNITED STATES UNDER THE TUCKER ACT

The consent of the United States to be sued is conferred by the Tucker Act, which embraces the entire jurisdiction of the Court of Claims and of district courts sitting as courts of claims to render judgments against the United States. A district court of the United States, in effect, sits as a court of claims when entertaining an action brought under the Tucker Act. *United States* v. *Pfitsch,* 256 U. S. 547. When so sitting it may entertain claims only for actual damages on money demands. See *Nortz* v. *United States,* 294 U. S. 317, 327; *Marion & Rye V. R. Co.* v. *United States,* 270 U. S. 280, 282; *United States* v. *Jones,* 131 U. S. 1. The limitations of the Tucker Act are jurisdictional (see *Finn* v. *United States,* 123 U. S. 227; *United States* v. *Wardwell,* 172 U. S. 48, 52) and statutes giving consent to be sued and waiving sovereign immunity must be strictly construed. *United States* v. *Michael,* 282 U. S. 656, 659–660.

The Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955, conferred upon courts of the United States the power, in an action within their jurisdiction, to declare rights in cases of actual controversy. This, obviously, must be held to refer to the ordinary jurisdiction of such district courts, and does not extend to the specific jurisdiction of such district courts when sitting as courts of claims under the Tucker Act.

Finally, as was suggested in Point I of this brief, were district courts empowered to enter declaratory judgments under the Tucker Act, it would in many instances, and specifically in the instant case, defeat itself, because the declaratory judgment would exceed the sum of $10,000, which is the jurisdictional limit of district courts under the Tucker Act. We submit, therefore, that the Declaratory Judgment Act neither conferred nor was intended to confer jurisdiction upon district courts to enter declaratory judgments when sitting as courts of claims.

IV

WHILE SERVING AS A FIELD DEPUTY MARSHAL BETWEEN THE YEARS 1895 AND 1902, THE PETITIONER WAS NOT AN EMPLOYEE IN THE CIVIL SERVICE OF THE UNITED STATES WITHIN THE MEANING OF THE RETIREMENT LEGISLATION

The time of service for eligibility for annuities under the retirement legislation:

> * * * shall be computed from the date of original employment, whether as a classi-

> fied or an unclassified employee in the civil service of the United States, * * * including periods of service at different times and in one or more departments, branches, or independent offices, or the legislative branch of the Government, and also periods of service performed overseas under authority of the United States, * * *. (Sec. 5 of the Act of May 29, 1930, c. 349, 46 Stat. 468, 472.)

The question here is whether a field deputy marshal compensated on a fee basis is an employee, classified or unclassified, in the civil service of the United States.

Under Section 843 of the Revised Statutes, the marshal was compensated by fees. Section 780 authorized the marshal to appoint deputy marshals, removable from office by the judge of the district or circuit court. Section 841 provided for the payment of a deputy marshal from the fees of the marshal. Section 9 of the Act of May 28, 1896 (c. 252, 29 Stat. 140, 181), puts the marshal on a salary basis in lieu of fees; Section 10 of that Act provides for the appointment by the marshal, with the permission of the Attorney General, of office deputies at salaries to be fixed by the Attorney General; Section 11 authorizes the marshal to appoint deputy marshals who shall be known as field deputies, and who shall hold office during the pleasure of the marshal, unless sooner removed by the district court, and who shall receive as compensation three-fourths of the gross fees, including mileage earned

by them, not exceeding $1,500 per annum, and such appointment may be canceled at any time, in the public interest, by the Attorney General.

In *Douglas* v. *Wallace,* 161 U. S. 346, it was held that a deputy marshal is the personal employee of the marshal and has no claim whatever against the United States for his compensation. To the same effect are *United States* v. *McDonald,* 72 Fed. 898, 900 (C. C. A. 9th); *Wintermute* v. *Smith,* 30 Fed. *Cas.* 17, 897 (S. D. O.); *Powell* v. *United States,* 60 Fed. 687 (C. C. M. D., Ala.)

The status of field deputy marshals under the Act of May 28, 1896, is precisely the same as that of the deputy marshals under the prior legislation, and the authorities cited above are applicable to them. They are employees of the marshal and are not employees in the service of the United States within the meaning of the retirement legislation.[13]

Other considerations would seem to support the view that a field deputy marshal, or time served by him, is not within the purview of the retirement legislation. Section 3 of the Act of May 29, 1930, specifying the eligible employees, contains the provision:

> *Provided,* That these groups shall include only those employees whose tenure of employment is not intermittent nor of uncertain duration.

[13] Even at the present time field deputy marshals are not listed as civil service employees for the purpose of benefiting by the Retirement Act. Nor are any deductions for such purpose made from their fees.

This would seem to contemplate inclusion only of such employees with some definite compensation and some security and continuity of service. A field deputy marshal compensated by fees would not seem to be in such class, and if the petitioner had served his entire time as a field deputy marshal, it would seem clear that he would not be entitled to any annuity.

The fact that petitioner was permitted to deposit an amount of $970.09 in the retirement fund has no significance as to the question presented. The deposit was authorized by the Act, and represented deductions from salary for services after July 31, 1920, to the time when monthly deductions were automatically made from petitioner's salary. The time served by petitioner as field deputy marshal was not considered, and the question here involved was not presented in any way. The petitioner, being over 55 years of age at the time that he severed his connection with the Government, and having a period of service to his credit of more than fifteen years, excluding the time served as a field deputy marshal, was entitled to an annuity under the Act, and the acceptance of his deposit to the retirement fund in order to make him eligible for such annuity was therefore proper. He was not entitled, however, to any annuity under the Act of June 16, 1933, on the basis of thirty years of service, as awarded by the court. We submit, therefore, that the ruling of the Veterans' Administration in the matter was correct.

CONCLUSION

We respectfully submit that the decree of the court below was correct, and should be affirmed.

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DECEMBER 1935.

APPENDIX

The Tucker Act, as amended by Section 24 of the Judicial Code, c. 231, 36 Stat. 1087, 1093 (U. S. C., Title 28, Sec. 41), provides in part as follows:

> The district courts shall have jurisdiction as follows:
>
> * * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which

had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

The Act of May 29, 1930, c. 349, 46 Stat. 468, 471, 478, provides in part as follows:

SEC. 4. The annuity of an employee retired under the provisions of the preceding sections of this Act shall be a life annuity,

terminable upon the death of the annuitant and shall be composed of: (1) a sum equal to $30 for each year of service not exceeding thirty: *Provided,* That such portion of the annuity shall not exceed three-fourths of the average annual basic salary, pay, or compensation received by the employee during any five consecutive years of allowable service at the option of the employee; and (2) the amount of annuity purchasable with the sum to the credit of the employee's individual account as provided in section 12 (a) hereof, together with interest at 4 per centum per annum compounded on June 30 of each year, according to the experience of the civil-service retirement and disability fund as may from time to time be set forth in tables of annuity values by the Board of Actuaries: *Provided,* That the total annuity paid shall in no case be less than an amount equal to the average annual basic salary, pay, or compensation, not to exceed $1,600 per annum, received by the employee during any five consecutive years of allowable service at the option of the employee, multiplied by the number of years of service, not exceeding thirty years, and divided by forty: *And provided further,* That any employee at the time of his retirement may elect to receive, in lieu of the life annuity herein described, an increased annuity of equivalent value which shall carry with it a proviso that no unexpended part of the principal upon the annuitant's death shall be returned. For the purposes of this Act all periods of service shall be computed in accordance with section 5 hereof, and the annuity shall be fixed at the nearest multiple of twelve.

The term "basic salary, pay, or compensation," wherever used in this Act, shall be so

construed as to exclude from the operation of the Act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the position as fixed by law or regulation.

* * * * *

SEC. 17. For the purpose of administration, except as otherwise provided herein, the Commissioner of Pensions, under the direction of the Secretary of the Interior, be, and is hereby, authorized and directed to perform, or cause to be performed, any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. An appeal to the Secretary of the Interior shall lie from the final action or order of the Commissioner of Pensions affecting the rights or interests of any person or of the United States under the Act, the procedure on appeal to be as prescribed by the Commissioner of Pensions, with the approval of the Secretary of the Interior.

The Commissioner of Pensions shall make a detailed comparative report annually showing all receipts and disbursements on account of annuities, refunds, and allowances, together with the total number of persons receiving annuities and the total amounts paid them, and he shall transmit to Congress, through the Secretary of the Interior, the reports and recommendations of the Board of Actuaries.

The Secretary of the Interior shall submit annually to the Bureau of the Budget estimates of the appropriations necessary to finance the retirement and disability fund and to continue this Act in full force and effect.

Section 8 (a) of the Act of June 16, 1933, c. 101, 48 Stat. 283, 305, provides:

> Whenever at any time hereafter prior to July 1, 1935, any employee of the United States or the District of Columbia to whom the Civil Service Retirement Act, approved May 29, 1930 (U. S. C., Supp. VI, title 5, chap. 14), applies, who has an aggregate period of service of at least thirty years computed as prescribed in section 5 of such Act is involuntarily separated from the service for reasons other than his misconduct, such employee shall be entitled to an annuity computed as provided in section 4 of such Act payable from the civil-service retirement and disability fund less a sum equal to 3½ per centum of such annuity: *Provided,* That when an annuitant hereunder attains the age which would have been the retirement age prescribed for automatic separation from the service applicable to such annuitant had he continued in the service to such retirement age, such deduction from the annuity shall cease. If and when any such annuitant shall be reemployed in the service of the District of Columbia or the United States (including any corporation the majority of the stock of which is owned by the United States), the right to the annuity provided by this section shall cease and the subsequent annuity rights of such person shall be determined in accordance with the applicable provisions of retirement law existing at the time of the subsequent separation of such person from the service.

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Supreme Court U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION OF FREDERICK D. DISMUKE FOR A REHEARING.

W. A. BOOTLE,
JOHN J. MCCREARY,
Counsel for Petitioner.

J. D. CARLISLE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 199.—October Term, 1935.

Frederick D. Dismuke, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 3, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

About June 30, 1933, petitioner filed a claim with the Administration of Veterans' Affairs for allowance of an annuity under the provisions of § 8 (a) of the Civil Service Retirement Act of June 16, 1933, 48 Stat. 283, 305, 5 U. S. C. A., § 692d, which authorizes payment of annuities, at a specified rate, under circumstances not now material, to retired government employees in the classified civil service who have rendered at least thirty years' service. His claim was rejected by the Director of Insurance, on the ground that his employment as a field deputy United States marshal from December 16, 1895 to April 30, 1902, which he had counted as a part of his thirty years' service, could not be so included, because field deputy marshals during that time were employees of the marshal appointing them, and not of the United States. Deducting this period, his total service was twenty-four years, which, if established in accordance with the provisions of the Act, would entitle him to an annuity at a lower rate, under § 7 of the Act of May 29, 1930, 46 Stat. 468, 474, 5 U. S. C. A., § 697a. On appeal the Board of Veterans' Appeals denied petitioner's application for the same reason.

In the present suit, brought in the district court under the Tucker Act, to recover accrued installments of the annuity based on the thirty-year period of service, and for a declaratory judgment establishing petitioner's right to such annuity, the court gave judgment for petitioner. The Court of Appeals for the Fifth Circuit reversed, 76 F. (2d) 715, holding that the district court was without jurisdiction because the Retirement Act must be construed as committing the adjudication of claims under it solely to administrative officers, to the exclusion of the courts. This Court granted cer-

tiorari, — U. S. —, in view of the public importance of the questions involved.

(1) The government urges that the district court was without jurisdiction to entertain the suit. The Tucker Act of March 3, 1887, 24 Stat. 505, as amended by § 24 of the Judicial Code, c. 231, 36 Stat. 1087, 1093, 28 U. S. C., § 41, permitting suits against the United States, confers on the district courts jurisdiction "concurrent with the Court of Claims of all claims not exceeding ten thousand dollars founded upon . . . any law of Congress or upon any regulation of an executive department or upon any contract, express or implied, with the Government of the United States. . . ."

Section 8 (a) of the Retirement Act declares that, under conditions specified, the employee "shall be entitled to an annuity payable from the civil-service retirement and disability fund." The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States. The present suit to recover the annuity is thus upon a claim "founded upon a law of Congress" and is within the jurisdiction conferred upon district courts, as are suits to recover sums of money which administrative officers are directed by Act of Congress to "pay" or "repay." *Medbury* v. *United States,* 173 U. S. 492; *McLean* v. *United States,* 226 U. S. 374; *United States* v. *Hvoslef,* 237 U. S. 1, and see *United States* v. *American Tobacco Co.,* 166 U. S. 468. The declaration that the annuities are payable from the retirement fund, which, by § 8 of the Act of May 22, 1920, 41 Stat. 618, is "appropriated for the payment of annuities," amounts to no more than a direction that they shall be charged on the books of the Treasury to the appropriation made for their payment. It does not impair or restrict the obligation to pay.

The Tucker Act declares that it shall not be construed as giving jurisdiction of "claims for pensions" or "of cases brought to recover fees, salary or compensation for services of officers of the United States." The government argues that the present suit must be either the one or the other. It does not press the contention that the annuities are "salary or compensation", which we think without merit, see *Retirement Board* v. *McGovern,* 316 Pa. 161, but it insists that the suit is brought to recover a pension. The

proviso withholding jurisdiction of suits on claims for pensions was a part of the original Tucker Act, which became law March 3, 1887, long before the enactment of the Retirement Act of May 22, 1920, and at a time when the term "pensions" commonly referred to the gratuities paid by the government in recognition of past services in the Army or Navy. The annuities payable under the Retirement Act are not gratuities in that sense. The annuitant contributes to them by deductions from his salary or by actual payments into the fund, as in the present case, and the scheme of the Act is to provide for payment of annuities, in part at least from contributions by employees, in recognition both of their past services and of services to be performed.

The Act itself, in contradistinction to the numerous pension acts, see 38 U. S. C., does not refer to the annuities as pensions, and expressly excludes from the service to be counted, in determining the class to which the annuitant is to be assigned, the period for which the employee "elects to receive a pension under any law . . ." § 3, Act of May 22, 1920, 41 Stat. 615, 5 U. S. C. A., § 707. We conclude that annuities payable under the Retirement Act are not pensions within the meaning of the Tucker Act and that suits against the government to recover them are within the jurisdiction of district courts, if not precluded, as the court below held they are, by the administrative provisions of the Retirement Act.

(2) Although the Retirement Act does not, in terms, forbid employees to assert in the courts rights acquired under it, the government insists that such restriction is to be implied from the administrative provisions of the Act. It points to the authority given the Commissioner of Pensions,[1] under direction of the Secretary of the Interior, to make rules and regulations for carrying the act into effect, § 17 of the Act of 1930, 46 Stat. 478, 5 U. S. C. A., § 707a, and to § 13 of the same Act, 5 U. S. C., § 703a, which prescribes the form of application for the annuity, the character of evidence to be presented in its support, and declares that "upon receipt of satisfactory evidence the Commissioner of Pensions[1]

[1] By Executive Order dated July 21, 1930, under § 1 of Act of July 3, 1930, 46 Stat. 1016, the functions of the Bureau of Pensions were transferred to the Veterans' Administration. By Executive Orders Nos. 6670 and 6731, dated respectively April 7, 1934, and June 5, 1934, under § 16 of Act of March 3, 1933, 47 Stat. 1517, and Order of the Civil Service Commission dated August 24, 1934, the administration of the Civil Service Retirement Act was transferred from the Veterans' Administration to the Civil Service Commission, effective as of September 1, 1934.

shall forthwith adjudicate the claim of the applicant," and finally to the administrative appeals authorized by § 17. From this it is argued that the prescribed application to the Commissioner, his adjudication, and the appeal from his decision to departmental officials, afford an exclusive remedy which precludes any resort to the courts for the recovery of the annuity.

The United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise. See *United States* v. *Babcock,* 250 U. S. 328. But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551; *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 249 U. S. 451, 454; *Ness* v. *Fisher,* 223 U. S. 683. If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein* v. *United States,* 266 U. S. 221, 225; *United States* v. *Williams,* 278 U. S. 255, 257, 258; *Meadows* v. *United States,* 281 U. S. 271, 274; *Degge* v. *Hitchcock,* 229 U. S. 162, 171; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 330, 331. But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. *United States* v. *Laughlin,* 249 U. S. 440, 443; *United States* v. *Hvoslef, supra; McLean* v. *United States, supra,* 378; *Parish* v. *McVeagh,* 214 U. S. 124; *Medbury* v. *United States, supra,* 497, 498; see *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 109, 110.

The Commissioner is required by § 13, "upon receipt of satisfactory evidence" of the character specified "to adjudicate the claim." This does not authorize denial of a claim if the undis-

puted facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it. The decisions of the Director of Insurance and the Board of Veterans' Appeals, and the stipulation of facts upon which the case was tried, show that the petitioner's claim for an annuity based on thirty years' service was rejected on the sole ground that his employment as a field deputy United States marshal could not be counted as service as an employee of the United States. The administrative decision thus turned upon a question of law, whether a field deputy marshal during the period from December 16, 1895 to December 30, 1902, was an employee of the United States. The administrative determination of that question is open to review in the present suit, and should have been considered and decided by the court below.

(3) We are of the opinion that a field deputy United States marshal from 1895 to 1902 was not an employee of the United States within the meaning of the Retirement Act. Before the Act of May 28, 1896, c. 252, 29 Stat. 140, 181, United States marshals were authorized to appoint deputy marshals, removable from office by the district judge or by the circuit court; R. S. § 780, who were to be paid a "proper" allowance, not to exceed three-fourths of the fees earned by them. R. S. § 841. Sections 9 and 10 of the Act of 1896 placed the marshal and office deputy marshals upon a salary basis, but § 11 authorized the marshal to appoint field deputy marshals to hold office during his pleasure unless sooner removed by the district courts, who should receive as compensation three-fourths of the fees, including mileage, earned by them. The status of a field deputy marshal under this legislation was therefore the same as that of all deputy marshals under the earlier Act. We regard the question whether such a field deputy marshal was an employee of the government or of the marshal as settled by the decision and reasoning of this Court in *Douglas* v. *Wallace,* 161 U. S. 346, which held that, in view of the manner of a deputy marshal's appointment and payment, his claim for compensation had the status of that of a claim of an employee of the marshal, not of the government, and so was not affected by R. S., § 3477, declaring void any assignment of any interest in a claim against the United States. To the same effect are *United States* v. *McDonald,* 72 Fed. 898, 900; *Powell* v. *United States,* 60 Fed. 687;

Wintermute v. *Smith,* 30 Fed. Cas. 17897. This has been the administrative ruling since 1920, see Claim of George Taylor Larkin, recorded in 21 P. & R. D. 42. A construction of such long standing is not lightly to be overturned. See *United States* v. *Moore,* 95 U. S. 760, 763; *Logan* v. *Davis,* 233 U. S. 613, 627; *Maynard* v. *Elliott,* 283 U. S. 273; *Brewster* v. *Gage,* 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375; *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.,* 287 U. S. 178; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315. Later legislation providing for payment of annuities to employees of the United States must be taken to have been adopted in the light of it.

Since the record does not disclose any administrative determination of petitioner's right to an annuity computed on the basis of twenty-four years service, the sole issue now presented is whether the decision that he was not entitled to the annuity calculated on the basis of thirty years' service was erroneous. The judgment of the court below must therefore be affirmed, but for reasons stated in this opinion and not those stated in the opinion of the court below.

Affirmed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

Comes now Frederick D. Dismuke, petitioner, and presents this, his petition, for a rehearing based upon the following grounds:

First. The cases of *Douglas* v. *Wallace*, 161 U. S. 346; *United States* v. *McDonald*, 72 Fed. 898, 900; *Powell* v. *United States*, 60 Fed. 687, and *Wintermute* v. *Smith*, 30 Fed. Cas. 17897, accepted by this Court as controlling, are not controlling and when carefully examined are not in point.

Second. It is believed that this Court overlooked the case of *United States* v. *Matthews*, 173 U. S. 381, and also the case of *Walker* v. *United States*, 139 Fed. 409, affirmed without opinion by the Fifth Circuit Court of Appeals in 148 Fed. 1022.

Third. When the question, whether a field deputy marshal from 1895 to 1902 was an employee of the United States, is decided free from supposedly controlling decisions and when it is decided in accordance with the opinion of this Court in the case of *United States* v. *Matthews*, 173 U. S. 381, it must be decided in the affirmative.

FIRST.

The cases relied upon by the Government and considered by this Court as controlling are not in point.

Petitioner is frank to state that he did not anticipate that there was any danger of this Court's deciding against him upon his contention that he was an employee of the United States within the meaning of the Civil Service Retirement Legislation, and he apprehends that he did not brief that question as carefully for this Court as he should have. His overconfidence on this point is attributable to the fact that he had no difficulty on that question in the trial Court and he was convinced that the Court of Appeals agreed with him on that question because, if it had not, it probably would not have based its decision upon the more involved question of administrative law. It seems perfectly plain to petitioner that the four cases relied upon by the government and considered by this Court as controlling upon this question are easily distinguishable from the instant case. Petitioner is probably somewhat at fault in not distinguishing these four cases as thoroughly as he might have in his original brief. He was not sure, of course, whether this Court would pass upon that question, inasmuch as the Court of Appeals failed to pass upon it, or would send the case back to the Court of Appeals for a decision upon that question. Petitioner asks the indulgence of the Court while he now undertakes to

point out more clearly the clear distinction between the four cases above referred to and the instant case.

Petitioner asks for a rehearing upon the ground that this Court considered *Douglas* v. *Wallace*, 161 U. S. 346, as controlling upon the instant case and considered *United States* v. *McDonald*, 72 Fed. 898, 900; *Powell* v. *United States*, 60 Fed. 687, and *Wintermute* v. *Smith*, [illegible]0 Fed. Cas. 17897 as being to the same effect when petitioner thinks that he can demonstrate that none of these cases are controlling.

All that was decided in the case of *Douglas* v. *Wallace*, 161 U. S. 346, is that a deputy marshal does not have a claim against the United States for his portion of the fees earned, but has a claim against the marshal personally. That means simply that the deputy could not maintain a suit against the United States for his portion of the fees. That is entirely different from holding that the relation of master and servant, or employer and employee, does not exist between the United States and the deputy. All that was said in the opinion of the Court in the *Douglas* case, in addition to the holding above mentioned, was mere dictum. This Court in that case did not say and was not called upon to say whether or not the deputy marshal was an employee of the United States. The furthest the Court went in that direction was to say that the deputy's claims for services against the marshal "stand upon the same footing as those of an ordinary employee against his employer." That is a far cry from saying that the deputy is not an employee of the United States.

This Court has held that the relation of master and servant does not depend upon who pays the servant. In the case of *Standard Oil Company* v. *Anderson*, 212 U. S. 215, the Court says,

> "In many of the cases the power of substitution or discharge, the payment of wages, and other circumstances bearing upon the relation are dwelt upon.

> They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control."

In the same case this Court said:

> "It is insisted by the defendant that the winchman, though in its general employ, had ceased to be its servant, and had become, for the time being, with respect to the work negligently performed, the servant of the master stevedore. This may be true, although the winchman was selected, employed, paid, and could be discharged by the defendant."

The real test as to when the relation exists was expressed by this Court in the leading case of *The Singer Manufacturing Company* v. *Rahn,* 132 U. S. 518, as follows:

> "And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' " The rule is stated in 18 Ruling Case Law, Page 490 as follows:
>
> "The relation, whatever term may be used to describe it, exists, it ordinarily is said, whenever one person stands in such a relation to another that he may control the work of the latter and direct the manner in which it shall be done. The essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist. Again, the manner in which payment is made may under some circumstances be decisive of the question, but this is not an invariable criterion by any means."

The case of *Employers Indemnity Company of Philadelphia* v. *Kelly Coal Company* (Ky.), 149 S. W. 992, is to

the same effect as the authorities above cited and recognizes specifically that the mode of payment is not decisive in determining whether the relation of master and servant exists.

To show how perfectly patent it is that this Court never intended in the *Douglas* v. *Wallace* case to hold that the deputy is not an employee or an officer of the United States and did not intend to fix the relation existing between the deputy and the United States, we cite the opinion in the case of *United States* v. *Matthews,* 173 U. S. 381, which was decided by this Court three years after the *Douglas* case was decided. In the *Matthews* case, the Attorney General, acting pursuant to an Act of Congress, offered a reward of $500.00 for the arrest of Asa McNeil. Matthews and Gunn, one a regular and the other a specially appointed deputy marshal, made the arrest and sued for the reward. The question arose as to whether a deputy marshal was prevented from recovering the reward by reason of the general statutory provision forbidding

> "officers in any branch of the public service or any other person whose salary, pay, or emoluments are fixed by law or regulations," from receiving "any additional pay, extra allowance or compensation in any form whatever" (Rev. Stat. 1765), and because of the further provision "that no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law * * *."

Mr. Justice White delivering the opinion said it was

> "unnecessary to determine whether a deputy marshal is an officer of the United States within the meaning of Section 1765 of the Revised Statutes and section 3 of the Act of June 20, 1874 * * *."

Moreover, in a concurring opinion in the *Matthews* case, Mr. Justice Brown who wrote the opinion in the *Douglas* v. *Wallace* case had this to say,

> "While I think *a deputy marshal is beyond all peradventure an officer of the United States,* yet as his compensation is by fees not paid *directly* by the government, but by agreement with the marshal, subject only to the limitation that such fees 'shall not exceed three fourths of the fees and emoluments received or payable' to the marshal 'for services rendered by him' (such deputy), I think it a grave question whether he is within the spirit of either of the sections above quoted. I consider it a reasonable construction to hold that these sections are limited to those who receive a salary or other compensation directly from the government, or one of its departments, and doubt their application to one who, although *holding a permanent appointment as an officer,* receives no pay directly from the government, but only such compensation as his superior may choose to allow him. (*Douglas* v. *Wallace,* 161 U. S. 246)." (Italics ours.)

It is clear, therefore, that this Court in the case of *Douglas* v. *Wallace* did not intend to say that a deputy marshal is not an officer of the United States because Mr. Justice Brown who wrote that decision, only three years later, stated that "beyond all peradventure" a deputy marshal is "an officer of the United States" and cited the *Douglas* v. *Wallace* case as an authority for that statement. The truth is that the question in the instant case was not even remotely before the court when *Douglas* v. *Wallace* was decided.

It does not answer the question under consideration to say that the deputy was an employee of the marshal. The opinion of the Court in the instant case takes for granted

that the deputy marshal must be an employee of the government *or* of the marshal. The Court's statement is as follows:

> "We regard the question whether such a field deputy marshal was an employee of the government or of the marshal as settled by the decision and reasoning of this Court in *Douglas* v. *Wallace,* 161 U. S. 346 * * *."

We submit that for certain purposes the deputy can be an employee or an appointee of the marshal and at the same time be an employee of the government. Of course, it has never been held by this Court that the deputy is an *employee* of the marshal. *Douglas* v. *Wallace* held only that the deputy's claims for service against the marshal "stand upon the same footing as those of an ordinary employee against his employer." Take that opinion written by Mr. Justice Brown together with the concurring opinion in the case of *United States* v. *Matthews,* also written by Mr. Justice Brown, to the effect that the deputy is "beyond all peradventure an officer of the United States," and we have this situation: The deputy marshal is an officer of the United States who must look only to the marshal for his pay. That is not an anomalous situation. The opinion of this Court in the case of *Standard Oil Company* v. *Anderson,* 212 U. S. 215, cited above, recognizes the law to be that the relation of master and servant may exist between two persons although the servant must look to a third person for his pay. The Biblical injunction that a man cannot serve two masters does not apply.

> "A substitute employed by a servant, in accordance with a custom permitting such hiring, or with the implied knowledge of the master or his subsequent ratification, is entitled to the same protection as the servant, and is bound by the terms and conditions of his predecessors contract, and the fact that the employee *receives his own regular wages* does not affect the rela-

tion of the substitute to the master. 39 C. J., page 38 Sec. 9. (Italics ours.)

"The rule is well settled that a person who is procured by an employee to act as his substitute or to assist him in his duties, the employer assenting to the arrangement, occupies the position of an employee, and that the duty owed him by the employer is the same as that owed to other employees. *And it does not make any difference that the substitute or assistant is promised no compensation for his services.*" 18 Ruling Case Law 577, Sec. 83. (Italics ours.)

The same principle, that a substitute engaged by a regular employee, with the implied approval of the employer, becomes the latter's employee, is recognized by the opinion delivered by Mr. Justice Sutherland in the case of *Baltimore & Ohio Southwestern Railroad Company* v. *Lula Burtch,* 263 U. S. 540. The relevant portion of the decision is as follows:

"There is a preliminary dispute as to whether Burtch stood in the relation of employee at the time of the injury, and this we first consider. The testimony shows that Burtch was not regularly employed, but that he engaged in this particular work at the request of the train conductor, because it was necessary to unload the cutter, and the train crew was unable to do so without help. The evidence tends to show that the conductor, in making the request, followed a longstanding practice to call upon bystanders to assist in unloading heavy freight. These facts, either undisputed or established by the verdict of the jury under appropriate instructions, are ample to sustain the conclusion reached below that there was an exigency which authorized the conductor to employ outside assistance, and that Burtch, for the time being, occupied the relation of employee to the company."

In the case of *Charles Derr Construction Company* v. *Gelruth* (Oklahoma), 120 Pac. 253, it was held that

> "The relation of master and servant existed between the employees of said construction company and the City of Shawnee."

When Mr. Justice Brown in the case of *United States* v. *Matthews* says that the deputy marshal is an officer of the United States, we take it that such statement is, at least, equivalent to saying that he is an employee of the United States on the theory that the greater includes the lesser. The distinction between an officer and an employee is pointed out in the case of *Throop* v. *Langdon*, 40 Mich. 673, as follows:

> "The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public officer for misfeasance or nonfeasance in office, usually, though not necessarily, in the tenure of his position."

This Court is the case of *Metcalf* v. *Mitchell*, 269 U. S. 514, in an opinion by Mr. Justice Stone, defined the terms "office" and "officer" as follows:

> "An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties and its compensation. * * * The term 'officer' is one inseparably connected with an office."

In the *Twenty Per Cent* cases, 13 Wall. 577, 578, this Court construed an Act of Congress giving additional compensation to certain employees of the government in the civil service in the City of Washington. In one of the cases, *United States* v. *Miller*, 13 Wall. 577, the question arose as to whether the foreman of carpenters working on

the Capitol Extension was an employee of the government so as to become a beneficiary under the Act. The Court said:

> "Employed, as he was, by the authority of the Secretary of the Interior, it is clear that he was an employee in the civil service in that department, as neither a commission nor a warrant of appointment is required to evidence such an employment."

In the case of *United States* v. *Manning,* 80 U. S. 577, the claimant was a watchman or a guard at the jail. This Court pointed out that as the office of warden was created by law and the warden selected the guards at the jail "unquestionably, guards of the jail are employees of the warden, and the office of warden of the jail is a bureau of division of the Department of the Interior." The significance of that case, as we understand it, lies in the fact that although the benefits of the Act were for "employees of the government" and this Court decided that the claimant was an "employee(s) of the warden," nevertheless, he was entitled to the benefits of the Act as an employee of the government.

In the next of the *Twenty Per Cent* Cases, 13 Wall. 568, there were eight claimants. This Court said:

> "Persons so employed are properly in the service if they were employed by the head of the department or of the bureau or any division of the department charged with that duty and authorized to make such contracts and fix the compensation of the person employed, even though the particular employment may not be designated in an appropriation Act."

Of course, the United States is a corporation sovereign. It can act only through agents. All officers and employees of the United States must of necessity be selected or appointed by some other representative of the government.

The more important officers are appointed by the President with the advice and consent of the Senate. Some of the lesser important officers are appointed by other representatives of the government. Sec. 780 of the Revised Statutes specifically authorized the marshal to "appoint" one or more deputy marshals. The idea of "appointing" him carries with it the idea of naming him to a public office. This is borne out by the requirement that he take an oath of office that he will properly "perform the duties of the office of marshal (or marshal's deputy, as the case may be)." R. S. 782. The power of appointment had to be vested somewhere. With reference to Assistant United States Attorneys, it is vested in the Attorney General; with reference to deputy marshals, it was vested in the marshal. Both are none the less public officers and employees of the United States.

Let us suppose a private corporation with its principal office and place of business is in Washington, D. C. It has a branch office in Macon, Georgia. It has in charge of that branch office a manager. It appropriates for the salaries of the branch office $500.00 a month and authorizes the manager to select an assistant and to make any agreement which he desires to make with that assistant as to the portion of the $500.00 the assistant is to receive for his services, provided always that the assistant shall not get more than a certain percentage of it. The assistant is appointed solely to assist the manager in conducting the affairs of the corporation, and the corporation from Washington issues detailed instructions as to what the duties of the manager and the assistant manager shall be and as to the manner in which these duties shall be performed. Let us say that the corporation goes further and says to the assistant that he must look solely to the branch manager for his remuneration. Let us suppose further that the corporation gives to the manager the right to dispense with the assistant's serv-

ices at any time he wants to, the corporation reserving the right similarly to dispense with the assistant's services any time it wants to and to reduce the assistant's pay any time it so desires. Can there be any doubt under the law that this assistant manager is an employee of the corporation?

We must remember that it was the United States which authorized the marshal to appoint the deputy; it was the United States which prescribed, by an Act of Congress, the oath of office which the deputy must take; it was the United States which provided, by an Act of Congress, the amount of fees payable to the marshal or the deputy and the maximum proportion of those fees which the deputy could receive, and reserved the right to the Attorney General to reduce that maximum percentage of the fees, receivable by the deputy "whenever the returns show such rate to be unreasonable" R. S. Sec. 841. We must remember also that even before the Act of May 28, 1896 the deputy was removable from office by the District Judge or by the Circuit Court R. S. Sec. 780. Of course, if the deputy were merely a personal and private employee of the marshal, the government, through the agency of the District or Circuit Court, would have no right to remove him, nor would the Attorney General have the right which he did have under Section 841 R. S. to reduce the deputy's income regardless of any agreement which the marshal might have made with him. We must remember also that according to the testimony of George F. White (R. 42), after the marshal appointed his deputy he had to make a report to the Attorney General and that "if he (the Attorney General) approved it, they stayed on; if he didn't, they went off." There is nothing in the record contrary to that testimony and this witness had knowledge of the facts because he was appointed a deputy marshal himself in 1889 (R. 40) and later became marshal in 1903 (R. 40). From his testimony, it seems that the deputy's appointment had to be approved

by the Attorney General before he had any status as a deputy marshal.

A case very much in point is *Walker* v. *United States*, 139 Fed. 409, decided in the Middle District of Alabama by District Judge Jones and affirmed without opinion by the Fifth Circuit Court of Appeals in 148 Fed. 1022. The Court said:

> "The law did not contemplate that the marshal could discharge his important duties without help, and therefore created the office of deputy marshal. It did not contemplate that either of these officers should perform *public services* without remuneration, and consequently made proper provision therefor. * * * In the matter of his compensation, the deputy marshal, *although a public officer performing public services*, occupied the anomalous position of a stranger to the government. *Douglas* v. *Wallace*, 161 U. S. 349. Nevertheless the law bound the marshal to include the fees earned by his deputies in his accounts, and to collect them from the government, in order that he might not retain more than the maximum compensation allowed by law, and that he might have a fund out of which to pay his deputies for their services. * * * The government knew, when the money was paid to Walker, that the greater part of it would be immediately paid out to others, *who in fact, whatever may be the legal theory, had rendered services to the government, to pay for which this very money was paid to him.*" (Italics ours.)

Later in the same opinion, the Court, with reference to the money received by the marshal and paid out to the deputy, uses this language,

> "and as to which, *whatever may have been his technical relations, he was in fact and in morals only a conduit* to pass the money to the persons *to whom it belonged.*" (Italics ours.)

We venture the hope that we have successfully demonstrated that the decision in the case of *Douglas* v. *Wallace* is not at all controlling upon the question now before the Court and that, in fact, the decision in that case does not indicate anything one way or the other as to whether the deputy marshal is, within the meaning of the Retirement Legislation, an employee of the United States. We venture the hope also that under the record in this case showing how the deputy was appointed, how completely he was controlled by the United States, how he served the United States, and the United States only, continuously as a deputy marshal for a period of more than six years, this Court will be convinced that he was during such period, in truth and in fact, an employee of the United States for all purposes except for the purpose of maintaining a suit against the government for his remuneration and particularly within the meaning of the Civil Service Retirement Legislation which, no doubt, had as its purpose the granting of retirement benefits to all of those people who served and worked for the government for the prescribed periods, regardless of whether, technically, they were employees or not. We are sustained in this hope by the fact that statutes of this type are to be liberally construed in order to confer the benefits which Congress intended. *Walton* v. *Cotton*, 19 How. 355.

It remains only to show that the cases of *United States* v. *McDonald*, 72 Fed. 898, *Powell* v. *United States*, 60 Fed. 687, and *Wintermute* v. *Smith*, 30 Fed. Cas. 17897, are not controlling. We agree with what this Court said in its opinion in the instant case that the three cases referred to are to the same effect as the case of *Douglas* v. *Wallace*, 161 U. S. 346. Each of these cases deals only with the question whether the government employee in each of the cases had a right to sue the government for his remunera-

tion or had to look to someone else for the same. The plaintiff in the *Powell* case was a deputy marshal. The Court said:

> "In contemplation of the law, there can be no severance or division of interest in the fees between the marshal and his deputies for which each can severally make claim."

In the *McDonald* case the suit was filed by a lawyer who had been appointed by a District Attorney ostensibly as a clerk but to assist him in the duties of his office. The Attorney General had authorized such appointment "on condition that the appointee should look solely to the District Attorney for his compensation which was to be paid out of the emoluments of the office." We submit that McDonald could not sue the government, not necessarily because he was not an employee of the government, but because his contract provided explicitly that he should look solely to the District Attorney for his compensation. They did not decide that McDonald was not an employee of the government. The Court which decided the *McDonald* case did not have to decide that question. Whether or not McDonald was an employee of the United States might depend upon facts which we do not know. We rather think that if he had worked for the United States as long, as continuously, and as exclusively as Mr. Dismuke did, and if he was as completely subject to the control of the United States through the Attorney General as Mr. Dismuke was, both as to the reduction of his income whenever the Attorney General so desired and as to the termination of his employment whenever the government so desired (through the District or Circuit Court prior to May 28, 1896, and through the Attorney General subsequent thereto, Sec. 841, R. S.), he should be considered as an employee of the United States. He would not be as clearly entitled to be so con-

sidered as is Mr. Dismuke because Mr. Dismuke's office as a deputy marshal was created by law, his oath of office prescribed by law, and his every duty commanded by Congressional enactments supplemented by the Attorney General's instructions.

The case of *Wintermute v. Smith,* 30 Fed. Cas. 17897, involved a motion to retax the costs. The costs, including the deputy marshal's fees, had been taxed against the plaintiff. There had been, however, full settlement of the marshal's fees by the plaintiff who held receipts for the payment of them, embracing a release from all further liability to the marshal for his fees. The Court held that the marshal's receipt must operate as a discharge of the plaintiff so far as the marshal's fees were concerned and that the deputy's remedy for compensation for his services was against the marshal.

In its opinion in the instant case, this Court relies upon the administrative ruling in the Claim of George Taylor Larkin, decided by the Secretary of Interior on October 4, 1920, and upon the principle that a construction of such long standing by administrative officials is not lightly to be overturned. We wish to point out that the Secretary's decision in the Claim of George Taylor Larkin *was not actually based upon the view that the deputy marshal was not an employee of the government.* It is true that the Secretary expressed this view, but such expression was made after he had already definitely decided the claim against the deputy marshal on an entirely different ground. As proof of this statement, we wish to cite the two concluding paragraphs in that opinion.

> "I therefore conclude that the act does not apply to employees whose separation from the service occurred prior to August 21, 1920, when the annuity provisions of the act became effective. Hence, *for that reason*

alone, this claimant has no annuitable status. (Italics ours.)

"Furthermore, he does not show that he was in the employ of the United States for a period of 15 years. His claim for service as assistant marshal, evidently intended as deputy marshal, can not be recognized, as it has been held that, under the law and procedure in force during the period covered by this claim, deputy marshals were employed by the marshal and not by the United States. *Powell* v. *United States*, 60 Fed. Rep. 687; *Douglas* v. *Wallace*, 161 U. S. 346; 3 Comptroller's Decisions, 648."

Furthermore, George Taylor Larkin, as will be seen from the opinion above quoted, referred to himself "as assistant marshal." From that we do not know what he was. Probably, he did not take the oath of office. He might have been a kind of bailiff and very probably he did not devote all of his time to his governmental duties because the Secretary's opinion shows that he made about $600.00 yearly as "assistant" marshal.

We wish to emphasize that apparently this conception of a deputy marshal as a purely personal employee of the marshal rather than as an employee of the United States had its inception in an unnecessary and baseless *obiter dictum* by the Secretary of the Interior. Since such statement on the part of the Secretary was not necessary to his decision, and since what this Court held in the *Douglas* v. *Wallace* case and what the lower courts held in the *McDonald, Powell and Wintermute* cases, is beside the point, we earnestly insist that this is the proper time to explode an erroneous administrative *dictum* before it finds lodgment in the decisions of the highest court in the land.

The opinion in the instant case cites several decisions of this Court for the proposition that an administrative construction of such long standing is not lightly to be over-

turned. These cases recognize that such construction ought not to be overruled "without cogent reasons"; (*United States v. Moore,* 95 U. S. 760, 763; *Logan* v. *Davis,* 233 U. S. 613, 627); "except for weighty reasons" (*Fawcus Machine Company* v. *United States,* 282 U. S. 375, 378; *Brewster* v. *Gage,* 280 U. S. 327, 336).

The case of *Interstate Commerce Commission* v. *New York, N. H. and H. R. Company,* 287 U. S. 178, recognizes only that long administrative practice has at least a "sanction of validity." The case of *Maynard* v. *Elliott,* 283 U. S. 273, deals with a construction of a section of the Bankruptcy Act, approved by both courts and text writers for about twenty-six years. The case of *Norwegian Nitrogen Products Company* v. *United States,* 288 U. S. 294, 315, holds that "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction" and that such practice, "consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."

How can we say that the Secretary's *dictum* in the *George Taylor Larkin* case has been "consistent and generally unchallenged" when it did not amount to anything in the first place because George Taylor Larkin had no claim, regardless of the *dictum* and it would have done him no good to refuse to acquiesce in the same? So far as we know, no person has ever acquiesced in this particular administrative *dictum.* So far as we know, no person has ever been denied his civil service annuity because of a ruling, administrative or judicial, that a field deputy marshal is not an employee of the United States.

Moreover, this Court in the case of *United States* v. *Tanner,* 147 U. S. 661, said:

> "It is only in cases of doubt that the construction given to an Act by the department charged with the duty of enforcing it becomes material."

In that case the Court said also:

> "If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but as it is clear to us that this construction was erroneous, we think it is not too late to overrule it."

SECOND.

This Court must have overlooked the cases of United States v. Matthews. 173 U. S. 381; Walker v. United States, 139 Fed. 409, and also United States v. Tinklepaugh, 3 Blatchf. 425, 28 Fed. Cas., page 193, case No. 16,526.

From what has been said in the first division of this petition for rehearing, it is apparent that this Court overlooked the case of *United States* v. *Matthews*, 173 U. S. 381. It is true that in that case this Court did not decide specifically whether a deputy marshal is an officer of the United States, stating on the contrary that it was not necessary to decide that question. Nevertheless, Mr. Justice Brown, in a concurring opinion, he being the same Justice who wrote the opinion in the case of *Douglas* v. *Wallace*, said that "beyond all peradventure" a field deputy marshal was "an officer of the United States." Certainly, if the case of *United States* v. *Matthews* had not been overlooked by this Court, *Douglas* v. *Wallace* would not have been considered by the Court as settling our question. We say this because the author of the opinion in *Douglas* v. *Wallace* did not so consider it. He cited *Douglas* v. *Wallace* in his concurring opinion in the case of *United States* v. *Matthews*, 173 U. S. 381, 388.

From what has been said in the first division of this petition for rehearing, we think it is clear also that this Court should have the benefit of the decision in the case of *Walker* v. *United States*, 139 Fed. 409. It is true that our brief did

not contain that citation. That case is discussed in the first division of this petition, and we shall not go into it again. The logic and force of that opinion is, it seems to us, irresistible. The Court said that whatever the legal or technical theory may be, the deputy marshal really works for the government and when it collects the full amount of the fees from the government he is no more than a mere conduit through whom the deputy's share of the fees flows to its rightful owner. The Fifth Circuit Court of Appeals affirmed that case for the reasons assigned by the District Court, the memorandum opinion being found in 148 Fed. 1022.

We have also overlooked what is perhaps the oldest decision dealing with the status of the deputy marshal, *United States* v. *Tinklepaugh* (C. C. N. Y. 1856), Fed. Cas. No. 16,526. Section 5398 of the Revised Statutes, making it a crime to obstruct, resist or oppose any officer of the United States, had not been extended at that time so as to protect any person authorized to serve or execute any writs or process. The statute applied at that time only to officers of the United States. In the *Tinklepaugh* case, it was decided squarely that a deputy marshal of the United States is an officer of the United States within the meaning of that section. The contention was made in that case that the deputy was a mere agent or servant of the marshal and was not, within the meaning of the law, an officer of the United States. The Court repudiated that contention and since the opinion in that case shows so convincingly the reasoning upon which it is based, we take the liberty of quoting from it.

> "The question, then, is—were Ryer and Horton officers of the United States, authorized to serve the warrant? They were deputies of the marshal. It is so charged in the indictment. As such deputies, they were authorized to serve the warrant without any special

appointment. But it is said that, although they may have been authorized to execute the warrant, they were merely agents or servants of the marshal, and were not, within the meaning of the law, officers of the United States. A little consideration of the laws of congress will show that a deputy marshal is an officer of the United States, authorized to serve process; and, if he be such officer, so authorized, resistance to him is prohibited by the act of congress in question. The marshal has power, as there shall be occasion, to appoint one or more deputies, who are removable from office by the judge of the district court or the circuit court sitting in the district, at the pleasure of either. Act Sept. 24, 1789 (1 Stat. 87), § 27. If a deputy marshal can be removed from office, he is an officer before he is so removed, for, he cannot be removed from office unless he is an officer; and, as he has power to serve process, he is an officer of the United States empowered to serve process. Upon the death of the marshal, his deputies continue in office, unless otherwise specially removed, until another marshal is appointed and sworn. Act Sept. 24, 1789 (1 Stat. 87), § 28. Every marshal or his deputy, when removed from office, has power notwithstanding his removal, to execute all such precepts, as are in his hands at the time of such removal. Id. Marshals and their deputies have the same powers, in executing the laws of the United States, that sheriffs and their deputies in the several states have, in executing the laws of the several states. Act Feb. 28, 1795, § 9 (1 Stat. 425). When a witness is material on the trial of a criminal case, a judge is authorized to issue a warrant, directed to the marshal or other officer authorized to execute criminal and civil process, to arrest such witness and carry him before such judge. Act. Aug. 8, 1846, § 7 (9 Stat. 74). These several laws show that deputy marshals are officers of the United States authorized to serve process. There may be persons who, in certain cases, are authorized to serve process, who may not be officers of the United States. In certain cases a private individual

> may serve process—as, when a marshal or his deputy is a party. In such cases, writs and precepts are to be directed to such indifferent persons as the court, or any justice or judge, may appoint. Act Sept. 24, 1789, § 28 (1 Stat. 87). This last provision also shows that congress deemed deputies of the marshal to be officers of the United States. Ryer and Horton, therefore, being, as charged in the indictment, deputies of the marshal, were officers of the United States, authorized to serve process, within the meaning of the act of congress in question."

The *Tinklepaugh* case was followed in the case of *United States* v. *Martin*, 17 Fed. 150 (District Court Oregon), the Court saying,

> "There is no question but that Morse (a deputy marshal) was 'an officer of the United States' within the purview of the statute * * *."

THIRD.

When the question whether a field deputy marshal from 1895 to 1902 was an employee of the United States is decided free from supposedly controlling authorities and in accordance with the decision of this Court in the case of the United States v. Matthews, it must be decided in the affirmative.

In determining whose employee the deputy marshal was, we take it that we need only to ascertain, as was said by Mr. Chief Justice Taft in the case of *Linstead* v. *C. & O. Railway Company*, 276 U. S. 28, "for whom he was working". We know of no better answer to that question than the answer contained in the case of *Walker* v. *United States*, 139 Fed. 409, and *United States* v. *Tinklepaugh*, Fed. Cas. No. 16526.

Mr. Chief Justice Taft in the *Linstead* case, *supra*, recognizes that such inquiry is not answered by ascertaining who pays the wages. He expresses it this way:

> "We do not think that the fact that the Big Four road paid the wages of Linstead and his crew or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job."

This Court has recognized that a person can be the employee of another for the purpose of certain legislation, although probably not an employee for all purposes. In the case of *Hull* v. *Philadelphia & Reading Railway Company*, 252 U. S. 475, the question arose as to who the deceased's employer was at the time of his death, and the Court said:

> "• • • We think, from the whole case, that deceased remained for all purposes • • • certainly for the purposes of the act • • • an employee of the Western Maryland Company only."

In the case of *Fuller Company* v. *McCloskey*, 228 U. S. 194, the facts were as follows: The Fuller Company contracted with Hibbs to erect for him an office building. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The Elevator Company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an employee of the Otis Company, who was paid and generally controlled by that company. After its installation the Fuller Company entered into an arrangement with the Elevator Company by which it became en-

titled to use this elevator in the prosecution of its work, paying to the Elevator Company $3.00 per day which was to cover the wages of the operator of the elevator, the Otis Company reserving the primary right to use the elevator. The Court held that the operator of the elevator was the servant of the Fuller Company. It seems, therefore, that although the operator of the elevator was employed by the Otis Company who *paid him* and generally controlled him, nevertheless he was at the same time an employee of the Fuller Company. That was the correct result because he was actually working for the Fuller Company, although, we submit, he *could not have sued* the Fuller Company for his wages, there being no privity of contract between the two.

The marshal cannot be considered as an independent contractor and the deputy as his employee. The position of the independent contractor and the question of when the employees of the independent contractor become the employees of the person desiring the work to be done is fully dealt with in the leading case, *Standard Oil Company* v. *Anderson*, 212 U. S. 215. This Court said in that case that the inquiry must be:

> "Whose is the work being performed, * * * a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work,"

That is the same case which holds that the payment of wages is not the ultimate fact but is only more or less useful in determining whose is the work and whose is the power of control.

While we do not think that the marshal can by any stretch of the imagination be looked upon as an independent contractor, nevertheless, if he did at the moment of the appointment of the deputy have such status the deputy immedi-

ately became the servant or employee of the United States by reason of the complete and thorough control it exercised.

"If, however, the employer retains or assumes control over the means and method by which the work of a contractor is to be done, the relation of master and servant exists between him and servants of such a contractor, and the mere fact of nominal employment by an independent contractor will not relieve the master of liability where the servant is in fact in his employ." 39 *C. J.*, Page 38.

"It is not necessary, to create the relation of master and servant, that the master shall directly employ the servant, or that the servant shall be directly responsible to the master, or that the master shall have authority to control his employment, fix his wages, or discharge him. When a person who undeniably occupies the relation of servant employs, with the consent and approval of the master, another to assist him in the performance of the duties he is discharging for the master, the relationship of master and servant is thereupon created between the master and the person so employed, although the person so employed may be compensated by and be under the immediate control of the person employing him. The master, by consenting to an arrangement like this, assumes to exercise towards the person so employed the duty that he owes to servants employed by himself. If the rule were otherwise, the master could, by conferring upon a servant the authority to employ, compensate, and control assistants, relieve himself of the ordinary duties imposed by law upon the master by the relation of master and servant." *Paducah Box & Basket Co.* v. *Parker*, 136 S. W. 1012. (Court of Appeals of Kentucky.)

Let us consider a few of the outstanding characteristics of the deputy marshal's status:

The power conferred upon the marshal to appoint the deputy comes from the government. (R. S. Sec.

780.) The very position itself is therefore created by the United States.

The marshal cannot retain the deputy as long as he wants to but the deputy is removable from office by a certain employee of the United States, namely, the District Court or the Circuit Court. (R. S. 780.)

With the passage of the Act of May 28, 1896, the United States, through the Attorney General, could discharge or remove the deputy at will. (28 U. S. C. A. 492.)

The instructions issued by the Attorney General after the passage of the Act of May 28, 1896, said, "Appointment of field deputy marshals other than as the public interest may require will be cancelled" (R. 32). (Petitioner served as a deputy marshal prior to the Act of May 28, 1896, only 5 months and 12 days, so that practically all of his service as a deputy marshal for 6 years, 4 months, and 14 days was under that Act.)

Under the testimony of Mr. George F. White, the appointment of the deputy had to be approved by the Attorney General, and if the Attorney General did not give his approval, the deputy "went off." (R. 42.)

Even before the Act of May 28, 1896, the United States prescribed the maximum amount which the marshal could agree for the deputy to receive and went further and reserved the right to reduce that amount "whenever the returns show such rate to be unreasonable." (R. S. 841.)

The United States required the deputy to take an oath of office. 28 U. S. C. A. 494. This requirement was the result of an act of Congress and not merely an instruction from the Attorney General.

The United States prescribed in minute detail both by legislation and by instructions from the Attorney General, the common superior of both the marshal and the deputy, exactly what duties were to be performed by each of them and in what manner they were to be performed (R. 24-39).

The Attorney General even told the deputy how to make out his vouchers (R. 29).

If the marshal died the deputy was required by statute to "continue in office, unless otherwise specially removed, and * * * execute the same in the name of the deceased, until another marshal is appointed * * *." (R. S. 789.) (Certainly the deputy would be an employee of the United States during such hold-over period.)

It was provided also that in certain instances an incoming marshal should make payments on account of services and expenses of his predecessor's deputies (R. 37). If the deputy were only a personal employee of the marshal, what interest would the United States have in paying such deputies?

As the Attorney General has correctly said in his book of instructions, "The compensation of a field deputy marshal for all his services * * * is paid by the United States" (R. 35).

As the Attorney General has also correctly said such compensation of the field deputy marshal is paid by the United States "in cases between individuals as well as in cases to which the United States are a party" (R. 35).

As was said by the District Court in the case of *Walker* v. *United States*, 139 Fed. 409, 416, with the approval of the Circuit Court of Appeals for the 5th

> Circuit, 148 F. 1022, the marshal in collecting the fees from the government and paying them over to the deputy "whatever may have been his technical relations, (he) was in fact and in morals only a conduit to pass the money to the persons to whom it belonged."

Since the United States authorized the deputy's appointment, could terminate that appointment at will, controlled the deputy's remuneration (with only a limited leeway to the marshal, and that leeway not absolute because the amount agreed upon by the marshal and deputy could always be reduced by the government when the returns showed the amount unreasonable (R. S. 841)) and since the United States controlled the deputy as to what he did and how he did it, how can it be said that he was not an employee of the United States? The power retained by the United States to discharge the deputy is utterly inconsistent with the deputy's being merely an employee of the marshal. The same is true as to the power retained by the United States to regulate the deputy's income.

Upon the oral argument of this case, the Court inquired whether it was not true that the deputy performed some services in connection with litigation between private citizens to which the government was not a party. The answer, of course, was in the affirmative. We submit, however, that it makes no difference. The Judge of the District Court of the United States likewise performs services in connection with private litigation but he is none the less an employee of the United States whether trying a railroad accident case or a criminal case. The District Court is a Court of the United States, an agency of the United States, created in accordance with the Charter of the Corporation Sovereign. Those who organized the United States Government deemed it advisable for it to have power to create United States Courts, and such Courts were created having jurisdiction to try certain types of private litigation. It is

a United States Court all the while and, in every case it tries, it is performing a function of and for the United States. Moreover, as the Attorney General has correctly said, the United States pays the field deputy marshal for his services "in cases between individuals as well as in cases to which the United States are a party" (R. 35).

Petitioner is so thoroughly convinced that he ought to win this case, it seems so clear to him that he was an employee of the United States, that he is afraid that he is overlooking some arguments that should be made. It seems to him that the finding of law made by the District Court is unanswerable, to-wit:

> "* * * The purpose and intention of Congress in enacting the statutes relating to the retirement of civil service employees was to provide an annuity for those who had been regularly engaged in working for the Government for the prescribed periods" (R. 11).

The beneficiaries of the retirement legislation did not have to be on the payroll of the United States, although petitioner thinks he would meet that requirement. The benefits of the Act were not confined to those who could maintain a salary suit against the United States. The Act as codified in Sec. 691 of Title 5 U. S. C. A., names as its beneficiaries "all employees in the classified civil service of the United States" * * *.

Petitioner certainly worked for the United States. It was government work which he did. He worked continuously and exclusively for the government in his capacity as an officer, a sworn officer, of the United States for more than 6 years. He took his orders from the government. He could have been fired by the government. His percentage of the fees could have been reduced by the government. He submits that he was an employee of the United States—at least within the meaning of the civil service retirement legislation.

Petitioner in this case is not begging. He is glad that this Court decided that it is not a pension which he seeks. He hesitates even to ask for a liberal construction of the civil service retirement legislation. He would not ask for it except that this Court has held, and the Courts generally hold, that he is entitled to it. Statutes of this type are liberally construed to carry out their beneficent purpose. "And where the language used may be so construed as to carry out a benign policy, within the reasonable intent of Congress, it should be done." *Walton* v. *Cotton,* 19 How. 355; *O'Dea* v. *Cook,* 169 P. 366 (1), 176 Cal. 659; *Klench* v. *Stockton,* 249 P. 46 (Cal. Appeals). 43 C. J. 813, Sec. 1408.

Conclusion.

Petitioner for the reasons above stated respectfully urges that this petition for a rehearing be granted so that the question can be argued further, orally or by brief, as the Court shall determine, and that upon further consideration the judgment of the Circuit Court of Appeals be reversed and petitioner be declared entitled to the redress he seeks.

Respectfully submitted,

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The undersigned counsel for petitioner hereby certifies that the foregoing petition is presented in good faith and not for delay.

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